

H-1B Filing Season on the Horizon

The H-1B filing period is fast approaching for employers who intend to sponsor a first-time H-1B worker during the next federal fiscal year (i.e., October 1, 2011 to September 30, 2012). The U.S. Citizenship & Immigration Services (USCIS) will begin accepting new H-1B petitions on April 1, 2011, as the H-1B regulations allow H-1B petitions to be filed up to six months before H-1B employment is to commence. Employers are encouraged to apply as soon as possible on or after this date for any potential new employees who will require a new H-1B in order to lock in an H-1B visa slot for any such potential employees for the upcoming federal fiscal year. Therefore, we recommend that employers canvass their workforce and potential recruitment pool immediately to determine who is most likely to need H-1B status in the upcoming federal fiscal year.

USCIS grants 65,000 new H-1B visa slots per federal fiscal year to employers who hire for positions that require at least a Bachelor's degree in a specialty field. An additional 20,000 new H-1B visa slots are available to employers who hire employees with Master's degrees from U.S. universities or colleges. These annual allocation limits are generally referred to as the "H-1B cap."

Because the demand for new H-1B temporary work visas often exceeds the supply of available H-1B visa slots for the fiscal year, USCIS often runs out of them months before the fiscal year ends. When USCIS receives more H-1B petitions than available slots, a random selection process is triggered to determine which petitions are accepted for processing. The H-1B cap for the 2011 federal fiscal year was reached on January 26, 2011.

An H-1B visa slot must be obtained in order for a foreign worker to engage in "new" H-1B employment. New H-1B employment generally refers to H-1B petitions that are filed for foreign nationals who are not currently in H-1B status. When new H-1B employment requires an H-1B visa slot it is generally referred to as "cap subject." Foreign workers whose employment is cap subject may not begin their H-1B employment until the federal fiscal year in which their H-1B visa slot was issued begins (i.e., October 1). However, there are exceptions when both new H-1B and continued H-1B employment is not subject to the annual H-1B visa slot allocation—these are generally referred to as "cap-exempt" petitions. Exempt from the H-1B cap are the following:

- H-1B petitions filed to extend the amount of time a current H-1B worker may

POSTED:

Feb 6, 2011

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remain in the United States.

- Individuals who have already been counted toward an H-1B cap within the past six years unless they would be eligible for another full six years of admission (i.e., unless they have been outside the U.S. for at least one full year since they last held H-1B status).
- H-1B petitions filed for employment at an institution of higher education or a related or affiliated nonprofit entity, or for employment at a nonprofit research organization or a governmental research organization. • H-1B petitions filed to change the terms of employment for current H-1B workers.
- H-1B petitions filed to allow current H-1B workers to change employers. However, where the H-1B worker is moving from a cap-exempt nonprofit organization to a cap subject for-profit company, the case will likely be considered to involve new employment, and as such, would be subject to the cap.
- H-1B petitions filed to allow current H-1B workers to work concurrently in a second H-1B position, including those workers whose original H-1B is with a cap-exempt employer.
- H-1B petitions for J-1 foreign medical graduates who have received a "Conrad 30" waiver of the two-year foreign residence requirement.

For those who are unfamiliar with the H-1B program, USCIS grants H-1B status in three-year increments for up to six years to qualifying foreign workers who will work in professional occupations (i.e., occupations which normally require a Bachelor's degree or higher). The H-1B employee is authorized to work only for employers who have filed an H-1B petition on their behalf. Employers must offer H-1B workers a wage that meets the prevailing wage for the position in the specific geographic area and satisfy certain mandatory notice requirements. Reinhart's attorneys can assist in determining whether the H-1B visa will help you meet your goals for your professional workforce."

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