

One Minute Memo[®]



H-1B Work Permit Filings: Will You Beat the Cap?

This One Minute Memo is intended to enable employers to identify any current employees and employment candidates who may require an H-1B work permit sponsorship before October 1, 2009. It is critical that employers identify any such candidates as soon as possible, as on April 1, 2008 USCIS will begin accepting H-1B petitions for the fiscal year 2009 H-1B quota (which begins on October 1, 2008). We anticipate that, like last year, on the very first day of filing eligibility, USCIS will receive H-1B requests far in excess of the annual quota, in effect resulting in a random lottery type selection process.

Background

There is an annual limit on the number of H-1B petitions that the USCIS can approve during the government's 2009 fiscal year (beginning October 1, 2008 and ending September 30, 2009). The H-1B cap for fiscal year 2009 is 65,000 (of which about 6,800 are reserved for nationals of Chile and Singapore under Free Trade Agreements with those countries). USCIS will begin accepting petitions for FY 2009 on April 1, 2008.

There is an additional quota of 20,000 H-1Bs which are reserved for persons who hold a Master's degree or higher awarded by a United States college or university. This additional quota of 20,000 H-1Bs has historically not been exhausted as early as the general H-1B quota of 65,000. However, we predict that the additional quota numbers will likely be exhausted within the first few days that USCIS accepts petitions.

Exceptions

With some exceptions, current H-1B workers are not subject to the annual cap. Non-cap cases include H-1B workers extending their status, changing from one H-1B employer to another, changing the terms of existing H-1B employment, or filing for a second (concurrent) H-1B position. In addition, foreign nationals seeking to work for an institution of higher education, for a related or affiliated nonprofit entity, or for a nonprofit research organization or a government research organization are not subject to the H-1B cap. For additional information on H-1B cap exemptions, visit www.immstar.com, click "Immigration Updates," and choose "Immigration News," then view "Managing the H-1B Cap."

Anticipated Unavailability of H-1B Work Permits Means Filing Early

Last year, the annual quota was reached on the first day of the filing period (*i.e.* April 1). This resulted in a random lottery, meaning that not every approvable petition that was submitted could be approved. We do not know how quickly the H-1B numbers will be exhausted for this year, but the most conservative strategy is to assume that the H-1B numbers will again be unavailable after the first day of filing (Tuesday, April 1, 2008). Once the H-1 numbers are exhausted, new H-1B work permits will not be available until October 2009.

Thus, to maximize the likelihood that affected employees will obtain an H-1B number effective as of October 1, 2008, employers must be in a position to file the H-1B application with the government on Tuesday, April 1, 2008. We are starting to prepare “cap-subject” H-1B petitions at this time and recommend that employers begin the process now for any employees or candidates who need an H-1B.

Persons Affected

The persons who need to file an H-1B include any current employees who hold F-1 student status and who will thus need H-1B status to continue working once their F-1 Employment Authorization (known as Optional Practical Training or “OPT”) expires. In addition, any pending hires should be assessed to determine whether an H-1B will be needed for eventual continued employment, including those who currently reside outside the United States. Further, any current employees who hold TN status and who are beginning the green card process may need to convert to H-1B status.

Alternatives to the H-1B Work Permit

In some cases, there may be alternatives to the H-1B work permit. If an affected employee falls into one of the following categories, that employee would NOT need to file for an H-1B work permit in April:

- Citizens of Canada or Mexico who are eligible for a TN visa. *Please note*, however, that not all H-1B-eligible Canadian or Mexican employees will qualify for TN status.

- Citizens of Australia, Chile or Singapore.
- The spouse of an L or E work permit holder, who is eligible for spousal employment authorization (EAD).
- J-1 nonimmigrants who have at least 18 months of academic training available as of April 1, 2008.
- With limited exceptions, H-1B employees who have held H-1B status at any time during the last six years.
- A foreign national who is married to a U.S. citizen and has received or will receive an Employment Authorization Document in connection with the pending green card process.
- Certain other foreign nationals who may qualify for O, E, or L visas.

Conclusion

Employers must act now to begin H-1B processing for candidates or current employees who require sponsorship and who do not meet one of the above exceptions. If an employer misses the filing deadline for an employee who requires H-1B sponsorship, the employee can lose legal status in the United States, including permission to work.

If you have any questions about this One Minute Memo, please contact the attorney with whom you work or any immigration attorney on our website, www.seyfarth.com.

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