

Management Alert



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

This Management Alert is intended to enable employers to identify any current employees and employment candidates who may require H-1B work permit sponsorship before October 1, 2014. We recommend that employers identify any such candidates as soon as possible, as on April 1, 2013, United States Citizenship and Immigration Services (USCIS) will begin accepting H-1B petitions for the fiscal year 2014 H-1B quota (which begins on October 1, 2013). **It is possible that**, as in previous recent years, USCIS **could** receive H-1B requests far in excess of the annual quota within the **first week** of filing eligibility, in effect resulting in a random lottery-type selection process. Although the 2013 H-1B cap was not reached until June 2012 and the 2012 H-1B cap was not reached until November 2011 (likely due to economic conditions), the most conservative approach is to submit all 2014 cap cases as early as possible.

Background

There is an annual limit on the number of H-1B petitions that USCIS can approve during the government's 2014 fiscal year (beginning October 1, 2013 and ending September 30, 2014). The H-1B cap for fiscal year 2014 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 2014 on April 1, 2013.

There is an additional quota of 20,000 H-1Bs that are reserved for persons holding a master's degree or higher awarded by a college or university in the United States. To be eligible for the master's cap, the employee must have completed the master's degree program prior to the filing date. This additional quota of 20,000 H-1Bs has historically not been exhausted as early as the general H-1B quota of 65,000.

If USCIS receives more than 20,000 H-1B petitions towards the so-called "master's cap," a separate lottery process is applied. USCIS will apply the random selection process to the master's cap petitions prior to conducting the regular H-1B lottery. Any master's cap petitions not selected in the master's lottery will be eligible for selection in the regular H-1B lottery, effectively being granted two opportunities at an H-1B visa.

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.

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

In 2008, USCIS announced that it would apply the lottery process to all H-1B petitions received during the first five days of the cap period, even if enough petitions were received to fill the annual quota on the first day of the filing period (i.e., April 1). 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 be unavailable after the first day of filing. Once the H-1B numbers are exhausted, new H-1B work permits will not be available until October 2014.

Thus, to maximize the likelihood that affected employees will obtain an H-1B number effective as of October 1, 2013, employers must be in a position to file the H-1B petition with the government on Friday, March 29, 2013 for USCIS receipt on Monday, April 1, 2013. We are preparing “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 in J-1 academic programs with limited practical training time as well as those who currently reside outside the United States. Further, any current employees who hold TN or E-3 status and who are beginning the green card process may need to convert to H-1B status.

“Cap-Gap” Relief for F-1 Students

Under a rule issued in 2008, DHS grants “cap-gap” relief to F-1 students whose OPT expiration dates fall between April 1, 2013 and October 1, 2013 and whose employers have filed H-1B petitions on their behalf. Such students will be given a bridge of both status and work authorization until October 1, 2013. This means that individuals currently in F-1 status who are completing OPT and whose employers have filed H-1B “change of status” petitions on their behalf will have their work authorization automatically extended until October 1, 2013 (the required start date on the H-1B petition), providing that the H-1B petition is approved. These individuals will not experience the gap in employment eligibility or in status that may otherwise have occurred. If the petition is rejected or denied prior to October 1, 2013, the “cap-gap” employment eligibility ends immediately.

The 2008 “cap-gap” rule also grants certain students up to 29 months of employment authorization, allowing them as many as three opportunities to apply for H-1B status before exhausting their work authorization. This special provision is known as the “STEM” provision. It applies to students who have pursued programs in science, technology, engineering, and math if their employers are registered for and in good standing with the federal government’s E-Verify program.

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 may 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, 2013.

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- 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.

For more information, please contact the Seyfarth attorney with whom you work or any *Business Immigration* attorney on our website.

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