

***Employer Adviser Hot Sheet --***  
**Breaking Developments in Labor and Employment Law**

**05.10.2005**

**Immigration Service Reverses Position, Limiting H-1B "Bonus" Numbers to Master's Degrees; Filing Begins May 12, 2005**

Beginning May 12, 2005, 20,000 "bonus" H-1Bs will become available for employers who wish to hire foreign workers this year in occupations for which degrees are required. However, U.S. Citizenship and Immigration Services ("USCIS," formerly the Immigration and Naturalization Service ("INS")) reversed its previous position and limited the bonus numbers to persons with U.S. Master's degrees, instead of allowing persons with Bachelor's degrees or the equivalent to apply.

**Where Did the Additional Numbers Come From?**

There is an annual quota of H-1B visas available for each fiscal year, October 1 through September 30. Employers can petition for new H-1Bs six months in advance. Last year, employers fed so many petitions into the pipeline that the annual quota was filled by the end of the day on October 1, 2004, and the pipeline was shut down on October 2, 2004. Employers were left to consider alternatives or to turn away valuable foreign candidates for positions.

In December 2004, the President signed into law the FY2005 Omnibus Appropriations Bill, adding 20,000 H-1B numbers to the cap for Fiscal Year (FY) 2005, but they were all reserved for graduates with Master's degrees from U.S. universities. In what appeared to be an uncharacteristically generous move, USCIS announced it would open the bonus numbers to anyone with at least a Bachelor's degree and would publish regulations about how to apply for one of the bonus numbers. There was much skepticism and confusion about USCIS' authority for the offer to make the "bonus" H-1Bs more broadly available than the law allowed. A recent announcement revealed that the expanded grant was too good to be true, as USCIS declared that the only eligible beneficiaries are those with at least a Master's degree from the United States.

**How Do Employers Apply for a Bonus H-1B Number?**

The regulations outline special filing procedures for these bonus H-1Bs and specify that they will be processed at only one of four regional USCIS Service Centers (the Vermont Service Center), regardless of where the employer is located or where the person would work. There are, however, procedures for upgrading certain H-1B cases pending at other USCIS Service Centers, provided the beneficiary is eligible for a bonus number.

For expeditious adjudication, an employer can request "Premium Processing." USCIS charges a fee of \$1,000 in addition to the regular H-1B filing fees. Cases accepted for Premium Processing are processed within 15 calendar days of receipt. Note, however, that if demand is extremely high, or if for any reason USCIS thinks it cannot process the petition within the requisite period, it will return the \$1,000 fee and the petition will be processed in the normal course, not within 15 days.

### **Are There Ways to Avoid the Cap?**

There are still other exemptions from the H-1B cap:

- Nonprofit institutions of higher education and research organizations are exempt from the cap, and entities affiliated with such organizations are also exempt.
- Petitions for persons who currently hold H-1B status and seek an extension do not count in the H-1B cap numbers.
- An H-1B worker can move or "transfer" to a new employer without using an H-1B cap number.
- A person who held H-1B status within the last year could return to H-1B status without using an H-1B cap number.

In addition, employers can file early, as far as six months in advance, for the FY2006 cap numbers.

### **What This Means for Employers**

Demand for these 20,000 H-1B numbers will be high. There is speculation that the cap could be reached within a matter of days after USCIS begins accepting petitions on May 12, 2005. The regulation even discusses a random process for selecting the petitions that are received as the bonus cap pipeline becomes filled.

Employers with Master's degree candidates should file as soon as possible for one of the bonus numbers. Exempt cases and FY2006 cases with an effective start date of October 1, 2005, or later can be filed any time. Employers should not delay in filing for FY2006 cases, either. The FY2005 pipeline was full on October 2, 2004, but speculation exists that the FY2006 pipeline might be full by June or July 2005.

Other options besides H-1B status often exist for hiring foreign nationals in the United States. For example, TN categories for Canadians and Mexicans might present options. In addition, other categories not subject to the cap exist for investors and their employees, trainees, artists, athletes, performers, cultural exchange program personnel, and persons with extraordinary ability. Companies with foreign operations might consider employing the foreign national abroad for one year, and then transferring the person back to the United States under the L-1 category. Employers can also consider new options for seeking permanent resident status and a "green card" for employees.

Employers must resist any temptation to have potential employees begin or continue working, even in what might be considered "volunteer" positions, without the proper work authorization. Hiring employees without the proper authorization, or payment of wages, can subject the employer to penalties and subsequent scrutiny under immigration and other laws.

Because of the changing nature of this area of the law and the importance of individual facts, this information is not meant to provide legal opinions and is not a substitute for the advice of legal counsel. For more information, please contact Diane M. Butler at Lane Powell PC:

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