

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

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### **H-1B Cap Hit Before Year Ends**

Without warning, U.S. Citizenship and Immigration Services ("USCIS") announced on August 12, 2005, that the H-1B quota for the coming year had been reached two days earlier, on August 10, 2005. Once again, this shows that demand for an educated workforce has outstripped the contracted supply in the United States. Unless Congress acts, employers will be left to consider alternatives or to turn away valuable foreign candidates for openings through September 30, 2006.

#### **What are the H-1B Cap Numbers?**

Under immigration law, the H-1B program allows U.S. employers to hire foreign nationals in "specialty occupation" positions, requiring at least a bachelor's degree or the equivalent. Under current law, there is a cap on the number of new H-1B petitions that will be granted each federal fiscal year ("FY"). FY2006 runs from October 1, 2005, through September 30, 2006. During the dotcom boom, the H-1B cap was temporarily raised to 195,000, but as of October 1, 2003, the cap dropped precipitously to 65,000. Of those, 6,800 H-1Bs are allocated to Singapore and Chile under recent free trade agreements with those countries, reducing the number generally available to 57,000 for the entire United States.

In December 2004, Congress carved out an exemption of 20,000 more "bonus" numbers to the H-1B cap, but reserved them for foreign workers with U.S. Master's degrees. For this bonus cap, the first 20,000 H-1B petitions that USCIS receives for employment in FY2006 will not be counted toward the regular H-1B cap. This cap is nearly exhausted as well.

H-1B petitions can be filed as far as six months in advance of an employment start date. Last year, the H-1B program for temporary workers had opened and closed in one day. On October 1, 2004, employers had filed enough petitions to fill the pipeline. This year, the pipeline was filled nearly two months in advance.

- 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 to a new employer without using an H-1B cap number;

- Nonprofit institutions of higher education and research organizations are exempt from the cap;
- In addition, the caps carved out for citizens of Chile and Singapore are rarely hit.

In contrast, an H-1B worker who terminates H-1B employment and is absent from the United States for one year or more uses a cap number to return in H-1B status.

## **What H-1B Alternatives Exist?**

There are alternative immigration options, other than H-1B status, that do not have a cap, including the following:

- L-1 intracompany transfers for persons who worked for a foreign entity related to a U.S. company for at least one year;
- TN status for Canadians and Mexicans;
- J-1 and other exchange programs;
- E-1/E-2 treaty investor and treaty trader status for numerous countries;
- E-3 visas for Australians with degrees (although procedures for applying have yet to be established);
- Labor certification for permanent resident status and "green cards."

Other creative alternatives are often available as well, for temporary or stopgap measures.

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

An employer cannot hire a person in the United States without proper work authorization. While the person cannot work without work authorization, there are ways to tide the person over for short periods of time while waiting for adjudication. In particular, the employer can give the potential employee a "signing bonus" as some support for the person waiting for the adjudication, so long as the person does not work in the interim.

There are often solutions for companies to hire valuable candidates. The employer who is considering hiring a foreign national in H-1B status should plan to prepare and file the petition as soon as possible, and as early as April 1 for the coming year H-1B quota.

Employers need to 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 can subject the employer to penalties and subsequent scrutiny under immigration law.

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