ALTERNATIVE OPTIONS FOR EMPLOYERS TO CONSIDER IN LIGHT OF THE H-1B VISA CAP

The H-1B visa cap is once again in the forefront of business immigration practice and congressional debate. Most users of the U.S. visa system know that the 65,000 H-1B visa cap for the current fiscal year (Oct. 1, 2007 to Sept.30, 2008) was reached on the very first day new petitions could be filed—April 2, 2007. Employers must look to alternative visa options for their foreign national employees and for those they hope to hire.

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The H-1B visa cap is once again in the forefront of immigration practice in the business community and congressional debate.[1] On April 3, 2007, the U.S. Citizenship and Immigration Service (USCIS) announced that the available pool of H-1B visas for this fiscal year (Oct. 1, 2007, to Sept. 30, 2008) had been exhausted on the very first day of filing—April 2, 2007![2] Most users of the U.S. visa system know that the H-1B visa cap—65,000 visas—for last fiscal year (Oct. 1, 2006 to Sept. 30, 2007) was reached in fewer than two months. According to a USCIS press release that was dated June 1, 2006, and issued to the public the next day, the allotted number of H-1B visas for the fiscal year had been awarded as of May 26, 2006.[3] Shortly thereafter, the separate H-1B cap for individuals with master's degrees, which provides for an additional 20,000 visas, was reached on July 26, 2006.[4] The USCIS will select cases with receipt dates of April 2 and April 3, 2007, and conduct a randomly selected lottery to determine which H-1B petitions will be accepted for processing and which ones will be returned to petitioners. The process to determine which petitions will be accepted for this fiscal year could take several weeks, at the very least. This article provides a general overview of the H-1B visa program and addresses some basic questions employers and foreign workers must confront about what happens now and how to plan for April 1, 2008—the start date for filing H-1B petitions for FY 2009.

Overview

U.S. companies commonly use the H-1B visa program to employ temporary foreign workers in the United States. The H-1B classification is a way to make nonimmigrant status available to certain highly educated and skilled foreign nationals coming to the United States to perform services in a "specialty occupation."[5] Specialty occupations are those that require a theoretical and practical application of a body of highly specialized knowledge as well as a bachelor's degree or a higher degree in the specific specialty, or the equivalent of such a degree through a combination of education, training, and work experience. Common examples of professionals who work in H-1B specialty occupations in the United States include accountants, economists, software developers, engineers, market research and financial analysts, graphic designers, certain business and medical professionals, teachers, journalists, attorneys, and ministers. The H-1B category is also often the one that provides professional work for graduating foreign students in the United States.

For employment in a specialty occupation on an H-1B visa, the employer must demonstrate the following:

- a bachelor's degree or equivalent is normally the minimum requirement for entry into the particular position;
- the degree requirement is common in the industry in parallel positions, or the particular position is so complex or unique that a degree is required;
- the employer normally requires persons filling comparable positions to have a bachelor's degree or equivalent; or
- the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with attainment of a degree.

The H-1B petitioner must be a viable enterprise and financially able to pay the proposed employee the salary that is offered. The employer must attest to the Department of Labor (DOL) that it will pay the prevailing wage or actual wage for the position, whichever is higher, and will otherwise protect the rights of U.S. workers by not using an H-1B employee to undermine the terms and conditions of U.S. workers' employment. But, unlike most permanent immigrant visa categories that require an employer to test the labor market through a recruitment effort, an employer does not need to demonstrate that U.S. workers are unavailable. Part-time employment is permitted, and multiple employers may file H-1B petitions for the same H-1B employee. Admission of a foreign national who has H-1B visa status is normally limited to a maximum of six years (including extensions). Once the worker has reached the maximum allowable period, he or she must leave the United States for at least one year before returning to the United States on a new H-1B visa status. However, a change to a different status may be possible for purposes of remaining in the country longer.

The Annual Cap

The number of new H-1B visas issued each year in the United States is subject to an annual congressionally mandated quota. The current law limits the number of foreign nationals who may be issued an H-1B visa to 65,000 per fiscal year.[6] The numerical limitation was temporarily raised to 195,000 in FY 2001, 2002, and 2003 but the increase has since been repealed. In addition, as part of the Free Trade Agreements that the United States has with Singapore and Chile, the USCIS reserves 6,800 H-1B visas of the quota for use only by nationals of Singapore (5,400) and Chile (1,400). Thus, the annual quota for these visas is really 58,200. Unused visa numbers allocated to Chile and Singapore for a particular fiscal year are added back to the pool of visa numbers for the next fiscal year.

Congress also enacted the H-1B Visa Reform Act of 2004, which created an additional 20,000 H-1B visas for foreign nationals who have earned a master's degree or higher from an institution of higher education in the United States.[7] On May 5, 2005, the USCIS published a rule implementing this law for FY 2005 and for future fiscal year H-1B filings.[8]

If the previous fiscal year's cap is reached, USCIS cannot authorize new H-1B visas until the start of the next fiscal year. Petitions for new H-1B employees can be filed no earlier than six months in advance of the start date requested. Because the federal government's fiscal year begins on Oct. 1, the earliest filing date for a new H-1B worker is April 1 prior to the beginning of the next fiscal year.

The record speed at which the current fiscal year's (2008) H-1B supply was exhausted testifies to the strength of the American labor market and highlights the failure of the U.S. Congress to provide a sufficient number of visas to meet the country's demand and need for additional highly skilled workers: the next fiscal year's supply was used up in just one day. For FY 2007, the supply was exhausted within two months, and the cap for FY 2006 was reached in mid-August. With the increase in demand, what U.S. employers and immigration attorneys were dreading has finally happened: a virtual moratorium on many employers in hiring new H-1B workers for almost 18 months. Until April 1, 2008, U.S. employers can only file H-1B petitions that are exempt from the H-1B cap, and no nonexempt H-1B workers will be available to start work until Oct. 1, 2008.

Given the likelihood of a similar scenario for FY 2009, to even have a chance of their petition being selected from the randomly selected lottery system, U.S. employers who hope to hire new foreign national employees should plan to file their petitions as close as possible to the April 1 starting date. Because the employer will need to obtain a certified Labor Condition Application (LCA) from the Department of Labor, which can be obtained no earlier than six months prior to the proposed start date of employment, employers need to prepare and file the LCA electronically on April 1, 2008, then file the H-1B petition as soon as the DOL certifies the LCA. In addition, certain H-1B petitions are exempt from the cap, and other nonimmigrant visa categories may be used in lieu of an H-1B visa.

H-1B Petitions That Are Not Subject to the Cap

Only "new employment" is covered under the H-1B visa cap. USCIS cannot count against the cap any person who has already been counted within the past six years, unless the H-1B candidate would be eligible for a new full six years of authorized H-1B admission at the time the new petition is filed.[9] The cap does not apply to H-1B petitions to change or amend terms of employment, extensions of status with the same employer, petitions for a concurrent H-1B position with another employer, or transfers from one H-1B cap employer to another H-1B employer under portability provisions.[10] In addition, petitions that are denied are not counted against the cap, and if the USCIS later revokes an H-1B petition as a result of finding fraud or willful misrepresentation of a material fact, the H-1B number for that petition must be added back to the cap in the fiscal year in which the petition is revoked, regardless of when the petition was originally approved.

Certain types of H-1B employment are exempt from the numerical limitations. The annual quota of available H-1B visas does not apply to H-1B employees who work at insti-

tutions of higher education, a related or affiliated nonprofit organization, a nonprofit research organization, or a governmental research organization.[11] J-1 nonimmigrant physicians who are changing their visa status to H-1B and who obtained national-interest waivers through the Conrad 30 Program or other government programs are exempt from the cap. However, if an H-1B professional transfers from an exempt nonprofit organization to a nonexempt for-profit company, that person would then be subject to the cap. If a foreign national employee does not fall within one of the cap exemptions enumerated above and an employer is faced with the current situation of an H-1B blackout, employers must look to alternative visa options for their foreign national employees and for those they hope to hire.

Alternative Visa Options for Employing Foreign Workers

Some employer and professional groups are lobbying Congress to increase the quota for H-1B visas, but the chances that any favorable legislation will be passed seem unlikely, despite the low unemployment rate in the United States and employers' relocation overseas. Employers can use many other temporary work visas that to hire certain foreign workers if they cannot file a petition for an exemption from the H-1B cap for a worker. Alternative visa options include the following:

- L-1A/L-1B visas (for intracompany transferees):[12] To qualify, a foreign worker must have been employed abroad continuously for at least one of the preceding three years by a qualifying foreign entity, such as a subsidiary, affiliate, branch, or joint venture of a U.S. company. There is no annual numerical limitation, but this visa is available only for executives, managers (L-1A visas), or employees with specialized knowledge (L-1B). Admission to the United States is for a maximum of five (for L-1B visas) or seven (L-1A visas) years (including extensions).[13]
- TN visas (for Canadian and Mexican professionals):[14] To qualify, the individual must be a citizen of Canada or Mexico and the proffered position must fall within the list of scheduled professional occupations under the North America Free Trade Agreement, which was created to facilitate the movement of business professionals between Canada, Mexico, and the United States. There is no annual numerical limitation for TN classifications, and they can be renewed indefinitely in one-year increments.
- E-1/E-2 visas (treaty traders and investors):[15] To qualify, an individual must be a citizen of a country that has a treaty of friendship, commerce, or navigation or a bilateral investment treaty with the United States. The employing entity must also be of the same nationality—that is, majority-owned or controlled by citizens of the worker's country. This visa is available to foreign nationals entering the United States solely for the purpose of conducting substantial trade (for E-1 visas) or developing and directing the operations of an enterprise in which they have invested substantial amount of capital or are actively in the process of doing so (E-2 visas). There is no annual numerical limitation; however, this visa is available only for executives, supervisors, or essential employees. Admission to the United States for the holders of these visas is for two years, but the classification can be renewed indefinitely as long as the trading or investment enterprise remains viable.
- O-1 visas (people with extraordinary ability):[16] To qualify, the individual must be a person of extraordinary ability in the sciences, arts/entertainment, education, business, or athletics, as demonstrated by sustained national or international acclaim. There is no annual numerical limitation, and O-1 classifications can be renewed indefinitely with admission for up to three years.
- P-1A/P-1B visas (group entertainers and athletes):[17] To qualify, an individual must be part of a group or a team that is internationally recognized (for P-1A visas) or a person who performs with or is an integral or essential part of an entertainment group that has been recognized internationally as being outstanding for a sustained and substantial period of time (P-1B). There is no annual numerical limitation, but admission for P-1 athletes is limited to a period of five years, with one extension up to five years; for P-1 entertainers, admission may not exceed one year.
- E-3 visas (Australian professionals):[18] To qualify, the individual must be an Australian citizen entering the U.S. to perform services in a "specialty occupation," which is defined the same was as that for H-1B professionals. Congress added this relatively new visa category in May 2005 as part of the REAL ID Act of 2005. There is an annual numerical limitation of 10,500 E-3 visas per fiscal year. E-3 classification can be renewed indefinitely, with admission for up to two years.
- J-1 visas (trainees):[19] To qualify, the foreign worker must be sponsored by an Exchange Visitor Program approved by the U.S. State Department and must be eligible to work for a U.S. employer and be compensated for training purposes. There is no annual numerical limitation; however, most J-1 trainee programs can last for no more than 18 months and cannot be extended. Certain J-1 programs may subject foreign nationals to two-year foreign residence requirements upon their completion of training in the United States before they are able to change their immigration status.
- H-3 visas (trainees):[20] To qualify, a foreign worker must be coming to the United States for training for a position abroad. The U.S. employer must be able to explain why it is willing to offer the training and demonstrate that it is not because the employer is receiving the trainee's productive work product, but that there is some other quid pro quo motivation—for example, training the person for a future position overseas and such training does not exist in the foreign national's home country. There is no annual numerical limitation. Admission to the United States on H-3 visa status is for the length of the training program, but for no more than two years.
- H-2B visas (temporary or seasonal workers):[21] To qualify, a foreign worker must be coming to the United States to fill a position that provides temporary service or la-

bor. The employer must demonstrate that the request for labor is a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. The employer must first obtain a labor certification from the Department of Labor that qualified U.S. workers are unavailable to fill the temporary positions being offered to the foreign nationals. There is an annual numerical limitation of 66,000 H-2B visas per fiscal year, with no more than 33,000 H-2B visas issued for the first six months. Admission is for the time period requested on the labor certification, but for no more than one year. H-2B classification can be extended for 12 months up to a maximum of three years.

- F-1 visas/OPT or CPT (students undergoing optional or curricular practical training):[22] To qualify, the foreign national student applies for and receives optional practical training (OPT) and employment authorization after completing all course requirements and course of study for a bachelor's, master's, or doctoral degree program. OPT may also be available before graduation when the proposed employment is preauthorized and related to the student's academic program. The OPT authorization is limited to 12 months of employment in the student's field of study and must be completed within 14 months of graduation.[23] Also, F-1 students may currently receive curricular practical training (CPT) for a different period if the employment is an essential component of the academic program. This classification normally requires that the employment is a graduation requirement and/or earns academic credit.
- R-1 visas (religious workers):[24] To qualify, a foreign national must be a minister, religious professional, or other religious worker in a religious vocation or occupation and be coming to the United States to work for a bona fide religious organization or its tax-exempt affiliate. The person also must have been a member of the religious denomination having a bona fide nonprofit religious organization in the United States for at least two years. There is no annual numerical limitation. Initial admission is for three years, with extensions for up to two years for a maximum of five years in R-1 classification.
- Q-1 visas (cultural exchange participants):[25] To qualify, the foreign national must be coming to the United States to participate in an international cultural exchange program that provides practical training, employment, and interactive sharing of the history, culture, and traditions of the person's home country in a setting in which the American public is exposed to the foreign culture. There is no annual numerical limitation. Admission is for the duration of the cultural exchange program, up to a maximum of 15 months.
- EB-1/EB-2 Preference Petitions (qualified individuals seeking permanent residency): In some instances a foreign national might be considered a "priority worker" based on being recognized as a person of extraordinary ability, an outstanding professor or researcher, or a multinational executive or manager (EB-1 visa classification). These individuals might be considered members of a profession who hold advanced degrees (master's degree or higher, or equivalent) or aliens of exceptional ability (EB-2). For these highly qualified aliens, an employer could file directly with the USCIS (for EB-1) or pursue filing a Program Electronic Review Management System application, if applicable, with the Department of Labor and, when issued, file a concurrent I-140 Petition for Alien Worker, I-485 Application to Adjust Status, and I-765 Application for Employment Authorization with the USCIS. This option is available only when the appropriate employment-based preference category has currently available visa numbers based on the foreign worker's country of chargeability.[26] Provided that certain other requirements have been met, this approach enables the foreign worker to bypass the nonimmigrant visa categories (H-1B and other categories) and apply directly for employment-based lawful permanent residency in the United States.

A Word About the H-1B "Cap Gap"

U.S. employers often want to continue to employ F-1 foreign students who are completing their 12-month period of post-completion optional practical training. Because OPT is commonly granted after graduation, many of these graduates' employment authorization will expire several months before the start of the new fiscal year and their H-1B start date. In these cases, USCIS has refused to accept a request for a change of status because of the gap between the end of their F-1 OPT and the start date of the employer's H-1B petition. Persons who find themselves in this situation must either request a change to a different and available status or leave the United States and return near to the beginning of the new fiscal year and their H-1B start date.

Conclusion

Although there is pending legislation in Congress to lift the H-1B cap, the current reality is that U.S. companies cannot hire foreign workers who are subject to the cap until the next fiscal year. Employers should start the recruiting and hiring process now in order to be ready to file new H-1B petitions on April 1, 2008, even though the employment start date will not be until Oct. 1, 2008. In the meantime, strategic consideration should be given to alternative visa categories that may be available to some individuals, which may allow them to work in the United States. More than ever, today it is important for employers to start planning early with their immigration counsel to explore options that are specific to their needs and to ensure that the H-1B cap does not hinder their hiring goals and ability to supplement their workforce with professional foreign workers. The list of available visa categories given above is not exhaustive, and each category has very specific requirements and limitations. The circumstances of each case should be discussed with counsel to determine if there is an alternative visa category that may fit the employer's needs and circumstances as well as the foreign worker's qualifications. **TFL**

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Endnotes

[1]The H-1B visa is used by U.S. employers who employ highly educated foreign national workers in a "specialty occupation." *See* INA § 101(a)(15)(H) and 8 U.S.C. § 1101(a)(15)(H).

[2]Available at www.aila.org/content/default.aspx?docid=22017.

[3]Available at www.uscis.gov/graphics/publicaffairs/newsrels/FY07H1BCap_060106PR.pdf.

[4]Available at www.uscis.gov/graphics/publicaffairs/newsrels/H1BMasters072806PR.pdf.

[5]*See* INA § 214(i)(1); 8 U.S.C. § 1184(i)(1); 8 C.F.R. § 214(h)(4)(ii); and 20 C.F.R. § 655.715.

[6]*See* INA § 214(g)(1)(A) and 8 U.S.C. § 1184(g)(1)(A).

[7]*See* INA § 214(g)(5)(C) and 8 U.S.C. § 1184(g)(5)(C) (as defined in § 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

[8]*See* Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23,775 (May 5, 2005).

[9]*See* INA § 214(g)(7); 8 U.S.C. § 1184(g)(7). (An H-1B could be eligible for a full six years if s/he was out of the country for a year or if the work s/he was performing in the U.S. was seasonal, intermittent or less than six months per year.)

[10]A foreign national with H-1B status in the United States may accept new employment upon the filing of a new petition by the prospective employer if (1) the person was lawfully admitted, (2) the new petition is not frivolous, (3) the new petition was filed before the date of expiration of the period of stay authorized by the attorney general, and (4) subsequent to such lawful admission the H-1B worker was not employed without authorization before the filing of such petition. *See* INA §§ 214(n)(1) and (n)(2)(A)(C). Filing is defined at 8 C.F.R. § 103.2(a)(7)(i) as physically received by the USCIS.

[11]*See* INA § 214(g)(5)(A) and (B); 8 U.S.C. § 1184(g)(5)(A) and (B).

[12]*See* INA § 101(a)(15)(L); 8 U.S.C. § 1101(a)(15)(L); 8 C.F.R. § 214.2(l); and 22 C.F.R. § 41.54.

[13]Time spent in the United States with H-1B status will count toward L-1A/B (five- or seven-year limits), and a person cannot change status to H-1B after reaching the five- or seven-year maximum. *See* 8 C.F.R. § 214.2(l)(12)(i).

[14]*See* 8 C.F.R. § 214.6.

[15]*See* INA § 101(a)(15)(E); 8 U.S.C. § 1101(a)(15)(E); 8 C.F.R. § 214.2(e); and 22 C.F.R. § 41.51.

[16]*See* INA § 101(a)(15)(O); 8 U.S.C. § 1101(a)(15)(O); 8 C.F.R. § 214.2(0); and 22 C.F.R. § 41.55.

[17]*See* INA § 101(a)(15)(P); 8 U.S.C. § 1101(a)(15)(P); 8 C.F.R. § 214.2(p); and 22 C.F.R. § 41.56.

[18]*See* INA § 101(a)(15)(E)(iii); 8 U.S.C. § 1101(a)(15)(E)(iii); PL 109-13, 119 Stat. 231, Division B, Title V, Sec. 501 (May 11, 2005); and 22 C.F.R. § 41.51(c).

[19]*See* INA § 101(a)(15)(J) and 8 U.S.C. § 1101(a)(15)(J).

[20]*See* INA § 101(a)(15)(H)(iii); 8 U.S.C. § 1101(a)(15)(H)(iii); and 8 C.F.R. § 214.2(h)(7).

[21]*See* INA § 101(a)(15)(H)(ii)(a) and (b); 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and (b); and 8 C.F.R. § 214.2(h)(5) and (6).

[22]*See* 8 C.F.R. § 214.2(f)(10)(ii).

[23]The foreign graduate may apply to change status to H-1B or another status during the authorized 60-day grace period after completing optional practical training. *See* Memo, Pearson, Exec. Assoc. Comm. Field Operations, HQ 70.23.1 RS-P (Aug. 19, 1998), *reprinted in* 75 Interpreter Releases, no. 32, 1147, 1167 (Aug. 24, 1998).

[24]*See* INA § 101(a)(15)(R); 8 U.S.C. § 1101(a)(15)(R); 8 C.F.R. § 214.2(r); and 22 C.F.R. § 41.58.

[25]*See* INA § 101(a)(15)(Q); 8 U.S.C. § 1101(a)(15)(Q); 8 C.F.R. § 214.2(q); and 22 C.F.R. § 41.57.

[26]Information regarding employment-based preference category visa availability is provided in the Department of State's monthly Visa Bulletin, available at travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.