

The ABC'S Of Immigration: Understanding the H-2B Cap

by
Gregory Siskind

On March 10, 2004, USCIS announced that it had received enough H-2B applications to meet the congressionally mandated cap of 66,000 workers for 2004. The new allocation of visas will be available for work beginning on October 1, 2004.

We advise people subject to the cap looking for alternative strategies to consult early with their immigration lawyers. Also, we expect that without Congressional action, the cap will be reached again next year, possibly even earlier than March. So acting early to get a visa under the allotment for 2004-2005 is very important.

What is an H-2B Visa?

The H-2B nonimmigrant work visa provides a method for US employers and agents to obtain the services of foreign nationals to fill temporary needs for additional workers.

How long can a nonimmigrant remain in the US on an H-2B visa?

The length of the stay on an H-2B visa is limited by the duration of the employer's temporary need for additional workers. The maximum authorized period of stay is one year, and the visa may be extended for a total of three years. However, extension applications are closely scrutinized.

One of the most significant restrictions on the H-2B category is the requirement that the need for the foreign worker is temporary. The Department of Labor recognizes four situations in which there is a temporary need for workers: recurring seasonal need, intermittent need, peak-load need, and need based on a one-time occurrence. Not only must the employer promise to employ the worker for a limited period of time, but the employer must verify that its need for the worker is temporary. There is no set rule for how long a season can be, but most Labor Department offices will consider seasons of more than nine or ten months a year to actually be continuous employment and not seasonal employment.

Who is eligible to apply for an H-2B visa?

Either skilled or unskilled workers may be employed on an H-2B visa. The only workers who are specifically excluded are 1) foreign medical graduates seeking to perform work in medical fields and 2) agricultural workers. The visa is also often used for entertainers and athletes who do not meet the requirements of the O and P visa categories.

US employers and agents are allowed to petition for temporary H-2B workers. US agents are allowed to file petitions for self-employed aliens, cases where there will be multiple employers, and cases involving foreign employers. When the H-2B worker is self-employed, there must be a contract between the agent and the worker specifying the wages and terms of employment. The agent must also provide a complete itinerary of the planned employment. When numerous employers are involved, the agent must provide the dates of the proposed employment, the name and address of the employers, and the locations where the work will be performed. When a foreign employer is petitioning for the services of an H-2B worker, the agent must submit the employment contract between the worker and the employer, as well as evidence of the agent's authority to act on behalf of the employer. In this situation the agent is the person who is authorized to accept service of process should the foreign employer be subject to sanctions under US immigration law.

How does an employer apply for H-2B workers?

The employer must first obtain a labor certification by the Department of Labor (DOL) in order for USCIS to issue an H-2B visa. The DOL must determine that there are no unemployed, qualified and immediately available US workers for the position in the geographical location of the proposed employment, and that employment of the foreign national will not adversely affect the wages or working conditions of US workers. To satisfy the DOL, the employer must conduct a recruitment campaign. Before beginning this campaign, the employer should contact the state employment office to discover what type of recruiting efforts will be required in that area. It is also important to note that a US worker who is otherwise employed, but expresses willingness to take the position recruited for is not considered unemployed.

Who is actually subject to the cap?

Not every H-2B applicant is subject to the cap. Visas will still be available for applicants who want to extend their stay, change the terms of their employment and to change or add employers.

Has the H-2B cap ever been hit?

This year is the first time the 66,000 cap has been reached. Until recently, the limits and requirements of the category caused usage of the visa to be marginal. For example, in 1995, only 2,398 H-2B visas were issued. However, the visa has become very popular in recent years, particularly in the hospitality industry.

What will happen to petitions that were not filed in time?

USCIS will return all petitions for first-time employment subject to the annual cap received after the end of business on March 9, 2004. Returned petitions will be accompanied by the filing fee and premium processing fee, if applicable.

Those cases that were filed before the announcement was issued by USCIS will be processed.

Can an applicant re-submit an H-2B application?

Petitioners may re-submit their petitions or file new petitions when they have received labor certification approval for work to start on or after October 1, 2004.

What will happen to the petitions that do not count against the cap?

Petitions for current H-2B workers normally do not count towards the congressionally mandated H-2B cap. USCIS will continue to process petitions filed to:

- o Extend the amount of time a current H-2B worker may remain in the United States
 - o Change the terms of employment for current H-2B workers
 - o Allow current H-2B workers to change or add employers
-

Gregory Siskind (gsiskind@visalaw.com) is a partner in the law firm of Siskind, Susser, Haas and Devine (www.visalaw.com), which has offices in the United States and around the world. He is an active member of the American Immigration Lawyers Association (AILA). He is a member of the American Bar Association (ABA), where he currently serves as Chairman of the Law Practice Management Publishing Board and on the Governing Council of the Law Practice Management Section. He was one of the first lawyers in the country (and the very first immigration lawyer) to set up a website for his practice and he was the first attorney in the world to distribute a firm newsletter via e-mail listserv. He is a co-author of *The J Visa Guidebook* published by LexisNexis Matthew Bender, and the author of *The Lawyer's Guide to Marketing on the Internet*, published by the ABA. He graduated magna cum laude from Vanderbilt University and received his law degree from the University of Chicago.