

## **The ABC's of Immigration: The H-1B Cap**

by Gregory Siskind

On October 1, 2003, the allotment of H-1B visas provided annually by Congress dropped from 195,000 to 65,000. On October 1, 2004, USCIS announced that it had received enough applications to meet the 2004 cap. The new cap will begin on October 1, 2005, and until then it will be impossible to obtain new H-1b visas for cap subject employees. It is not clear how the Congress and the employers will deal with this issue. Congress is considering legislation that will expand the number of exemption categories, which may alleviate the demand for capped H-1B visas.

### **Who is actually subject to the cap?**

Not every H-1B applicant is subject to the cap. Visas will still be available for applicants filing for amendments, extensions, and transfers unless they are transferring from an exempt employer or exempt position and were not counted towards the cap previously. The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations.

### **When was the last time the H-1B cap was hit?**

The H-1B cap was last hit on February 17, 2004 for the 2004 fiscal year.

### **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 October 1, 2004. Returned petitions will be accompanied by the filing fee.

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

### **Can an applicant re-submit an H-1B application?**

Petitioners may re-submit their petitions when H-1B visas become available for FY 2006. The earliest date a petitioner may file a petition requesting FY 2005 H-1B employment with an employment start date of October 1, 2006, would be April 1, 2006.

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

Petitions for current H-1B workers normally do not count towards the congressionally mandated H-1B cap. USCIS will continue to process petitions filed to:

- o Extend the amount of time a current H-1B worker may remain in the United States
- o Change the terms of employment for current H-1B workers
- o Allow current H-1B workers to change employers (unless the beneficiary is transferring from a cap exempt employer to a cap subject employer and was never counted towards the cap- in that case the beneficiary will be subject to the cap)
- o Allow current H-1B workers to work concurrently in a second H-1B position

USCIS will also continue to process petitions for new H-1B employment filed by applicants who will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research

organization. USCIS will also continue to process H-1B petitions for workers from Singapore and Chile consistent with Public Laws 108-77 and 108-78.

### **What will happen to F and J visa holders who are beneficiaries of an H-1B petition?**

In the past, INS (now USCIS) had safeguards in place for those with F and J visa status. According to 8 CFR Section 214.2 (f)(5)(vi), if it can be determined that all of the H-1B visas will be used before the end of the current fiscal year, the director of USCIS can extend the duration of status of any F-1 student if the employer has timely filed an application for change of status to H-1B.

To be eligible for this extension, the nonimmigrant must not have violated the terms of his or her nonimmigrant stay. An F-1 student whose duration of status has been so extended shall be considered to be maintaining lawful nonimmigrant status for all purposes under the Act, provided that the alien does not violate the terms and conditions of his or her F nonimmigrant stay. An extension made under this paragraph applies to the F-2 dependent aliens.

8 CFR Section 214.2(j)(1)(vi) has similar language regarding those in J status. If the USCIS director can determine that all of the H-1B visas will be used before the end of the current fiscal year, the director of USCIS may extend the duration of status of any J-1 nonimmigrant if the employer has timely filed an application for change of status to H-1B.

To be eligible for this extension, the nonimmigrant must not have violated the terms of his or her nonimmigrant stay and must not be subject to the 2-year foreign residence requirement in Section 212(e) of the Act. Any J-1 student whose duration of status has been so extended shall be considered to be maintaining lawful nonimmigrant status for all purposes under the Act, provided that the alien does not violate the terms and conditions of his or her J nonimmigrant stay. An extension made under this paragraph also applies to the J-2 dependent aliens.

The Federal Register Notice is available at  
<http://www.aila.org/infonet/fileViewer.aspx?docID=705&index=0>.

In FY 2004, USCIS provided limited relief to F-1 visa holders but we will likely not know until next spring what the USCIS will do for FY 2005.

Note: Physicians who received a J waiver under the Conrad State 30 Program are exempt from the cap.

### **What will happen if I am not exempt from the cap and my current status expires after the numbers run out?**

It is unclear on the date of publication how USCIS will treat those who are not exempt from the cap but whose status will lapse before new H-1B numbers are available. For many, other non-immigrant visas will be available including H-2B visas (though those are likely to cap out in April), J-1 trainee visas, E-2 and E-1 visas and TN visas.

An option available to many this year will be filing for permanent residency. There are many work-related green card applications that can be filed without a time consuming labor certification. Now that concurrent filing of I-140 and adjustment of status applications area available, it may be possible to secure an employment authorization document in a matter of a couple of months.

We advise people subject to the cap looking for alternative strategies to consult early with their immigration lawyers.

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**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.