

As published in "AHRMA Update On Us," November 2003.

EMPLOYERS NEEDING SPECIALIZED FOREIGN WORKERS MAY NEED TO ACT IN '03 OR GO WITHOUT IN '04

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The H-1B Non-immigrant Visa Cap has officially returned to 65,000 for Fiscal Year (FY) 2004, which began October 1, 2003. The Cap for FY 2003 was 195,000, of which it is estimated that more than 75,000 were used in the 2003 Fiscal Year which ended September 30, 2003. Even during the stagnant economy, annual demand for H-1B numbers has significantly exceeded 65,000. This means that H-1B cap concerns that created significant problems in the 1990's will return absent new legislation.

FY 2003 Pending Petitions Could Be Counted in FY2004

While it is clear that the H-1B cap is likely to be reached before the end of FY 2004, many petitioners and beneficiaries may be surprised to learn that the cap could be reached **much** earlier than anticipated. U.S. Citizenship & Immigration Service (CIS) and American Immigration Lawyers Association (AILA) insiders have reported the possibility that petitions pending for 4-6 months in FY 2003 and which were not approved by October 1, 2003, may be counted against the new, much smaller cap. Currently, it is estimated that approximately 22,000 such petitions are in the "pipeline" awaiting approval. If the CIS does in fact count these petitions under the FY 2004 cap, the actual cap petitioners and beneficiaries of new petitions are facing is closer to 43,000, half of current demand.

Free Trade Agreements Could Further Reduce H-1B Numbers

From the 43,000 unofficial cap, it also appears that those H-1B numbers set aside for nationals of Chile and Singapore may also be subtracted under recently enacted legislation implementing Free Trade Agreements between the United States and these countries. Up to 6,800 numbers may be set aside under the new legislation for Chile and Singapore. While it is unclear how many numbers will actually be set aside in this first year under the newly authorized program for nationals of Chile and Singapore, if the CIS allots the full 6,800 in FY 2004, the numbers available for all other nationalities could be reduced to less than **37,000 H-1Bs** available from October 1, 2003 until October 1, 2004.

Be Prudent: File H-1B Petitions as Soon as Possible

If the true cap is actually less than 40,000, the cap could be reached very early in FY 2004, perhaps as early as December 2003. This means that petitions filed earlier have a better chance of "beating the cap" and winning approval in FY 2004. While legislation may be passed later in 2004 to address cap issues, such legislation could be months in coming or could fail altogether in the current economic and political atmosphere.

Students with F-1 Optional Practical Training Employment Authorization

Employers should consider filing H-1B petitions now for all F-1 Optional Practical Training workers, even if the workers have valid employment authorization through May or June of 2004. If the cap is reached prior to obtaining H-1B status for such practical trainees, they may experience a gap in employment authorization between the expiration of their EAD cards and the approval of their H-1B petitions in the following Fiscal Year (i.e., employment authorization gap from May 2004-October 2004). Companies currently employing one or more F-1 Optional Practical Trainees should not wait until a few months before expiration of their current status to initiate the H-1B petitioning process, but should initiate the petitioning process as soon as possible.