
H-1B VISA QUOTA APPROACHING EXHAUSTION; Employers Should Act Now to File H-1B Petitions

On November 3, 2009, U.S. Citizenship & Immigration Services (CIS) released statistics indicating the H-1B quota is approaching exhaustion. Employers should act quickly to initiate new H-1B petitions in order to maximize the chance for allocation of an H-1B number before October 2010.

Annual H-1B Visa Quota

The H-1B visa quota for each fiscal year is 65,000. Of this number, 6,800 are set aside for citizens of Chile and Singapore; therefore, the effective cap for all other nationalities is 58,200. An additional 20,000 H-1B visas are available for candidates who hold at least a Masters Degree or higher from a U.S. institution of higher education. The CIS has already allocated 20,000 H-1B visas for petitions under the Masters Degree exemption, and 52,800 additional H-1B visas under the general H-1B quota. This means that only approximately 5,400 H-1B visas remain available for the remainder of Fiscal Year 2010 (until October 1, 2010).

Act Now to Accommodate DOL Delays

Before an H-1B petition can be filed, a Labor Condition Application (LCA) must be certified by the U.S. Department of Labor (DOL). Prior to July 2009, DOL certification was virtually instantaneous through the DOL's electronic filing system; however, in July the DOL made program changes that dramatically impacted certification times and increased the lead-time for filing an H-1B petition.

It now takes up to seven (7) business days to obtain DOL certification of an LCA. Certification may take longer for employers who have not filed H-1B petitions since July, due to a DOL system glitch that often fails to recognize valid Federal Employer Identification Numbers (FEIN) upon initial filing. Because of these DOL delays in certification of the LCA, employers should act quickly to initiate new H-1B petitions in order to maximize the chance to obtain an H-1B visa under the Fiscal Year 2010 H-1B quota.

H-1B Candidates

F-1 Students who have already begun employment, or who will begin employment between now and October 2010, pursuant to Optional Practical Training (OPT) are typically candidates for pursuit of H-1B nonimmigrant status and work authorization. Employers who have F-1 Students working pursuant to a valid OPT Employment Authorization Document (EAD) card are strongly urged to file H-1B petitions on behalf of these candidates at this time, even though these students may have several months of employment eligibility remaining pursuant to their OPT Employment Authorization Document (EAD) cards.

OPT EAD cards are valid for one year, and may only be extended under limited circumstances. This means students who began OPT employment in June 2009, will exhaust their OPT employment authorization in June 2010. Unless they have been approved for a change of status to H-1B, these students could face several months without employment authorization.

Certain TN nonimmigrants are also candidates for H-1B nonimmigrant status. Employers of TN nonimmigrants who wish to retain their TN employees on a longer-term basis should consider filing H-1B petitions on behalf of these candidates. Because the number of H-1B visas available each fiscal year is normally insufficient to meet demand, employers may wish to take advantage of the relative availability of H-1B numbers this fiscal year. Due to certain restrictions on TN status, employers seeking to pursue U.S. permanent residency on behalf of one or more TN employees are strongly urged to pursue H-1B status on behalf of those employees now.

Individuals who hold L-1B status are often candidates for H-1B nonimmigrant status, particularly if the employer seeks to retain the L-1B employee long-term. L-1B nonimmigrants are allowed only five years of L-1 eligibility. Often an L-1B employee's remaining L-1B eligibility is insufficient to complete the permanent residency process, or to reach a stage in the process that affords continuous work authorization. In such cases it is sometimes possible to change the L-1B employee's status to H-1B status in order to secure additional nonimmigrant status eligibility. Employers who are considering pursuing permanent residency on behalf of one or more L-1B employees are strongly urged to consider seeking a change of status to H-1B for those employees now.

Although economic circumstances may have resulted in a longer period of H-1B availability this year, this time appears to be approaching an end. H-1B demand could rebound next year, meaning there may never be a better time than now to file an H-1B petition. In order to maximize the opportunity to obtain one of the limited H-1B numbers that remain available for Fiscal Year 2010, and to avoid a potential gap in employment authorization, contact your Foster Quan immigration attorney now for assistance in evaluating candidate eligibility, developing an appropriate case strategy, and preparing the necessary documents for filing an H-1B petition before the H-1B numbers run out.