

USCIS Announces H-1B Cap Reached

October 4, 2004

Announcement: On October 1, 2004 at approximately 8:00 p.m. the USCIS announced that it has received enough petitions to reach the statutory cap for H-1B petitions, and that it will no longer accept petitions for new H-1B benefits for Fiscal Year 2005. Current law (8 USC § 1184(g)(1)(A) establishes an maximum of 65,000 annual approvals from the US Citizenship and Immigration Service of aliens newly classified to be in H-1B status. The US government operates on a fiscal year that begins October 1 and ends September 30. As a result, no additional H-1B petitions for “new” H-1B benefits can be filed at that time.

Despite the H-1B cap being reached on the first day into in FY2004, not every H-1B petition is affected by this announcement. As mentioned, only “new” H-1B benefits are subject to the H-1B Cap. Extension petitions are not subject to the cap. As a result, any person currently in valid H-1B status may have his/her employer file to extend his/her H-1B status, regardless of the H-1B cap. Additionally, any person who has been approved for H-1B status within the past six years, and who has not spent more than 1 year outside the US since receiving H-1B approved status, is exempt from the H-1B Cap

Further, certain employers are exempt from the limitations of the H-1B Cap, even in cases of petitions filed for “new” H-1B benefits. These exempt employers include:

- (A) an institution of higher education (4-year college or university);
- (B) a nonprofit entity related or affiliated with an institution of higher education; or
- (C) a nonprofit research organization;
- (D) or a governmental research organization.

Also exempt from the H-1B Cap are petitions for “concurrent” H-1B employment, as well as physicians who have obtained an IGA waiver of the 2-year home residence requirement. Concurrent H-1B petitions are those that request approval for an individual to work for two or more employers simultaneously.

H-1B Petitions Can Still Be Filed

Employers who missed the FY2005 H-1B Cap can look ahead to FY 2006 and begin to file new H-1B petitions as early as April 1, 2005. Any new petitions filed on or after April 1, 2005 would be prospective toward a future employment start date of October 1, 2005 or later. The only limitation to filing this type of petition is that it cannot be filed more than 6 months days in advance of the start date.