

IMMIGRATION

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H-1B Nonimmigrant Visa Petition Filing Season Approaches

On October 1, 2009, U.S. Citizenship and Immigration Services will release its new allocation of H-1B nonimmigrant visa numbers for Fiscal Year 2010. Current U.S. Immigration Laws cap H-1B visa availability for new employment situations at 65,000 per fiscal year, with an additional 20,000 visas made available to those holding advanced degrees from a U.S. university. U.S. employers wishing to file petitions to classify non-citizens as eligible for employment in H-1B nonimmigrant status must prepare to file their petitions for receipt by U.S.C.I.S. on April 1, 2009, which is the first day that such petitions will be accepted for processing by the Government. It is anticipated that the “Cap” will be reached on the first day of eligibility, April 1, 2009, for fiscal year 2010, as has been the case in recent years.

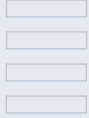
H-1B Visas are available for foreign nationals offered employment opportunities for “specialty occupations”, which require a minimum educational level of a Bachelor’s Degree or its equivalent to fulfill the position’s occupational responsibilities. A vast array of professional-level occupations may qualify for H-1B “specialty occupation” consideration, provided that it is common for such occupations to require at minimum a Bachelor’s Degree for entry into the position, or the employer normally requires such a degree for the position. Professional experience may be reviewed in addition to or in lieu of formal education. Three (3) years of experience are generally deemed to be the equivalent to one year of college education for H-1B eligibility evaluation.

To qualify a potential employee for H-1B status, the wage offered must be the higher of the Prevailing Wage for the metropolitan statistical area or the actual wage paid by the company to similarly situated employees as certified by the U.S. Department of Labor. U.S. Citizenship and Immigration Services adjudicates a petition for H-1B status, and H-1B status is available for an initial time period of up to three (3) years, and a maximum total time period of six (6) years, with extensions beyond 6 years in certain circumstances.

H-1B “visas” are very popular given the breadth of professional occupations that can qualify as “specialty occupations”, and given the fact that there is no prerequisite as to prior employment or achievement/ability of the potential employee, or as to structural/ownership issues for the employing entity that are present for other visa categories. With the limited number of new H-1B visas allocated on a yearly basis, it is important for employers interested in seeking H-1B status for non-citizen employees to be mindful of the filing timeframe and the need to complete processing of all required petitions.

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It is also important for employers to keep alternatives to H-1B nonimmigrant visas in mind when examining a potential offer of employment to a non-citizen or non-lawful permanent resident. For example, if a potential new employee already holds H-1B status from a prior employer, the person may not be subject to the "Cap", and may be eligible to start employment very soon after an employment offer is made. Moreover, Canadian and Mexican professionals may qualify for employment in the United States under "Trade NAFTA" without concern for the H-1B cap shortages if the employment offer is for a profession designated for temporary employment qualification by NAFTA. Thus, in the right circumstance, an alternative to an H-1B petition may be more cost-effective and have a higher certainty of potential success without concern over whether the H-1B Cap has been exhausted for the Fiscal Year. ■

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