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Impending Shortage of H-1B Visas for Professional Workers

By ERIC FLEISCHMANN
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Employers of foreign workers in the U.S. face a potential crisis–just as the economy is starting to recover, the number of new H-1B visas available for foreign professional workers has dropped sharply.

A Congressionally mandated cap that went into effect for fiscal year 2004, which started on October 1, 2003, limits the number of new H-1B visas available for foreign professional workers to 65,000. That may sound like a large number, but approximately 29,000 of those visas are already allocated to others, leaving only 36,000 for the balance of the current fiscal year.

Even in a slow economy, U.S. employers used 78,000 "cap" visas last year. One can easily foresee a serious shortage of new visas for foreign professionals this year. It is reasonable to predict that by April or earlier, depending on economic trends, the remaining cap visas will be issued and there will be no more available until next October.

The new H-1B cap will affect not only growing companies, but also those that seek to retain current staff or replace employees who have left. Two groups of current or prospective employees will suffer–those already in the U.S. in another status, such as F-1 students or J-1 trainees, and new hires from abroad.

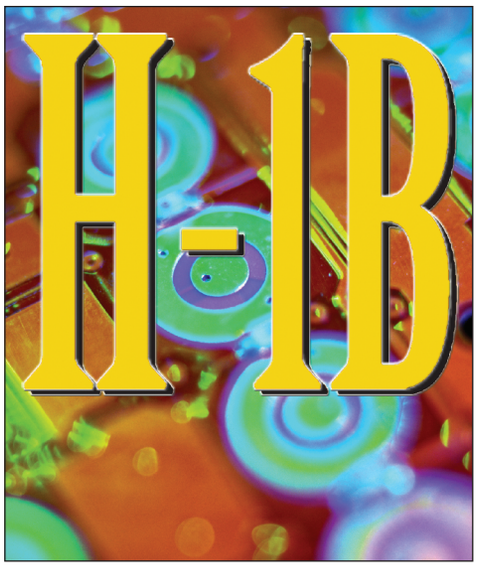
The cap does not affect the hundreds of thousands of foreign workers currently maintaining H-1B status because they were counted against a prior year's cap. Petitions on behalf of employees of universities, nonprofit research organizations, the government, or Defense Department projects also do not count against the cap.

Plan Ahead

As in most shortage situations, advance planning can help. To prepare for the impending H-1B shortage, each company should review the following questions:

Has the company hired any foreign workers who just graduated from U.S. universities? Do these employees have work authorization, known as optional practical training? If so, does their work authorization expire next spring, summer or fall, when the H-1B visas will no longer be available?

Did the company recently file any H-1B visa petitions for new hires now in a different status, such as J-1 trainee? If so, has the company checked current processing times at U.S. Citizenship and Immigration Services (USCIS) to see if the case will likely be approved before spring? (The Texas Service Center, for example, is currently taking about six months to process new H-1B petitions, and a case filed today might not be adjudicated until May 2004.)



Does the company employ any intracompany transferees nearing the end of five years in L-1B status? If so, is the company planning to return each L-1B worker back to an affiliate abroad, or will it need to file an H-1B petition to authorize a sixth year in the U.S?

Are there plans for starting substantial new projects? Would these require hiring new workers potentially subject to the H-B cap?

Employers should file H1-B petitions as soon as possible. Regulations permit filing up to six months in advance of the employment start date. In situations where a current or prospective employee has work authorization as an F-1 student, the petition may request a change from F-1 to H-1B status to become effective prior to the end of the student's practical training period.

Employers can file H-1B cases using the new Premium Processing Service to avoid the impending depletion of visas by increasing the speed of adjudication. In return for an additional fee of $1,000, the USCIS guarantees a decision within just 15 days or your money back.

Another strategy to deal with the shortage is to avoid the H-1B classification altogether. The law does not impose a cap on most other visa classifications. Companies should consider the O-1 category for individuals who have extraordinary ability in a particular field. The TN category is for citizens of Canada or Mexico who qualify as professionals under the North American Free Trade Agreement. The E visa category is an option for treaty traders or investors. U.S. consulates grant E visas to employees of foreign companies that either invest a substantial amount in their American operations or engage in a substantial volume of trade with the U.S.

Any company with affiliates or subsidiaries abroad should also consider the L-1 classification. This category is appropriate for workers who have spent one of the last three years working outside the U.S. for a foreign parent, affiliate or branch of the employer who will come to here as managers or to apply their specialized knowledge of the company's business operations.

Good News

There is some good H-1B news to report. The change in the law that occurred on October 1st not only cut the number of H-1B visas, but also eliminated a $1,000 user fee and certain restrictions for petitioners.

Congress imposed the $1,000 fee in 1999 to help fund the training of displaced workers and enforcement of H-1B regulations. This provision sunset on September 30th. Special restrictions on companies that employ 15% or more of their workforce in H-1B status also expired. These companies no longer need to attest that they have recruited for, and not displaced, U.S. workers. The Department of Labor will no longer initiate investigations in the absence of a complaint.

To provide relief from the new 65,000 H-1B visa cap, Congress must take action. Robert B. Reich, former U.S Secretary of Labor, recently predicted that " when the economy fully bounces back from recession (as it almost surely will within the next 18 months), a large portion of high-tech jobs that were lost after 2000 will come back in some form." If he is correct, U.S. companies will again need thousands of new H-1B workers. And if history is any guide, Congress will fashion some response to the needs of U.S. employers. ■