

Practice Advisory on the H-1B Cap (Updated 2/24/04)

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The FY2004 H-1B Cap Has Been Reached - What's Next?

Here's what we know:

- The U.S. Citizenship and Immigration Services (USCIS) announced on February 17, 2004 that it had received enough H-1B petitions to meet FY2004's cap of 65,000 new workers
- The USCIS also announced that it will reject any new H-1B petitions received after February 17, 2004, for first-time employment subject to the FY2004 annual cap. The announcement indicated that the USCIS will process all petitions filed for first-time employment if they were received by the end of business day on February 17.
- The USCIS indicated that the earliest date on which a petitioner may file a petition requesting new FY2005 H-1B employment is April 1, 2004, which is six months before the earliest possible start date in FY2005, October 1, 2004.
- The notice announcing the reaching of the cap indicated that petitions for foreign nationals currently in H-1B status do not count toward the H-1B cap. Thus, the notice indicated that the USCIS will continue to process petitions filed to extend status, change terms of employment, change employers, or work concurrently in a second H-1B position. However, the INA subjects to the cap individuals who are changing from a cap-exempt employer to a cap-subject employer.
- Under the INA, individuals who have been counted toward an H-1B cap within the past six years are not subject to the cap unless they would be eligible for another full six years of admission (i.e., unless they have been outside the U.S. for at least one year). No reference was made to this provision in the notice announcing the cap.
- Under the INA, J-1 physicians granted waivers of the two-year home residence requirement at the request of a State Department of Health (Conrad waivers) had been exempt from the cap. However, a peculiarity in how the exemption provision was drafted has raised some question as to whether that exemption sunset on October 1, 2003. The notice announcing the cap did not refer to this provision one way or another.
- Also exempt from the H-1B cap are H-1Bs who will work at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization.
- The USCIS will also continue to process H-1B petitions for workers from Singapore and Chile consistent with Public Laws 108-77 and 108-78.

What questions are still open?

- The Department of Homeland Security ("DHS") has not yet addressed what the procedures will be for persons in Duration of Status (F/J). AILA has been informed that this decision is in the hands of ICE, which controls the SEVIS system, and as of this writing no conclusion has been reached.

Background:

- When the H-1B cap was reached in 1999, the INS published an interim rule on June 15, 1999, amending the regulations to provide that the INS Commissioner could publish a notice in the Federal Register to extend the duration of status for certain F-1 and J-1 status holders when the H-1B cap was reached. The interim rule eventually became sections 8 C.F.R. 214.2(f)(5)(vi) and 214.2(j)(1)(vi).
 - The INS Commissioner exercised authority under these provisions in 1999 and again in 2000. The cap had not been reached since 2000 until the current year.
 - Under the reorganized regulations, the term "Commissioner" means, after March 1, 2003, the "Director of the Bureau of Citizenship and Immigration Services, the Commissioner of the Bureau of Customs and Border Protection, and the Assistant Secretary for the Bureau of Immigration and Customs Enforcement." 8 C.F.R. § 1.1(d).
 - As of February 19, 2004, no notice has been published in the Federal Register granting extended duration of status to F-1 and J-1 applicants for change of status to H-1B.
- The USCIS has not yet addressed how it will handle any remaining H-1B numbers under the United States-Chile and the United States-Singapore Free Trade Agreements.

Background:

- Under these agreements, H-1B numbers that are unused pursuant to the agreements at the end of a given fiscal year may be used under INA § 101(a)(15)(H)(i)(b) by those who applied within the fiscal year in which there are remaining numbers under the agreements, if those remaining numbers are used within the first 45 days of the next fiscal year.
 - The treaties themselves prohibit the imposition of a petitioning requirement, with the result that applications can be filed directly with the consulates. Thus, it is doubly unclear how USCIS will count usage of H-1B numbers under those treaties and how it will recapture any unused numbers.
- The USCIS also has not made clear how it will address the status of those who seek to change status to H-1B, but who are not in a status that is authorized for duration of status.

Certain factors need to be considered in this situation:

- It seems clear that, if the current nonimmigrant status will expire before the filing of a new H-1B petition is allowed (i.e., before April 1), a change of status to H-1B will not be approvable unless the person is first able to timely change to another status, such as B-2. But note, however, that an April 2, 2003, [Counsel's office memorandum](#) calls into question the extent to which applying for a "bridging" status will be effective or safe, particularly if the change of status application for the intervening status is denied.
- If the individual's current non-D/S nonimmigrant status will not expire until after April 1 when a new H-1B petition can be filed, but will expire before the earliest available requested start date of October 1, there is still considerable

question whether a change of status would be approved. In the past, if the new H-1B start date was not immediately available at the expiration of the previous nonimmigrant status, the then-INS took the view that there was a gap in status and change of status was not approvable. AILA has received no answer as to whether the USCIS will still take this view, but there is good reason to believe that this would still be the agency's position.

- Although the USCIS cut off filings based on its belief that it has enough cases in the pipeline to fill the cap, that count is not an exact science. Thus, it is at least possible that some cases in the pipeline will not be processed before the cap is actually reached with approved cases. The USCIS has given no indication how it will handle any "leftover" cases. Similarly, if it turns out that fewer than 65,000 petitions are actually approved, it is not clear how (or even if) the USCIS will reopen processing or filing to fulfill the cap.
- In the past, the INS assessed the numbers of H-1B petitions pending in the various Service Centers, and made efforts for the Service Centers with slower processing times to catch up to those with faster processing times in order to balance the processing of H-1B petitions throughout the country. The USCIS has not yet indicated whether it will implement a similar procedure this year. **The USCIS is implementing that same procedure this year.**
- **The USCIS is indicating in a Federal Register notice to be published February 25, 2004, that it will not suspend premium processing on cap-subject H-1B cases already filed by February 17.**
- AILA believes that new H-1B petitions filed in FY 2003 with a requested start date in that fiscal year should have been counted against 2003's cap even if they were not adjudicated until FY 2004. So far, USCIS has not adopted this view, but AILA will continue to advocate for it.

AILA is attempting to obtain answers from DHS on these open questions, and will notify the membership immediately on receiving any additional information. Visit AILA InfoNet frequently for the latest news on the H-1B cap.