

Update on H-1B Visa Category  
October 31, 2005

Each fiscal year, U.S. Citizenship & Immigration Services may approve up to 65,000<sup>1</sup> new H-1B nonimmigrant petitions for professionals working in a “specialty occupation.” In recent years, the maximum number of H-1B petitions, or “cap,” has been reached well in advance of the start of the fiscal year on October 1. For Fiscal Year 2006 (FY2006) which runs from October 1, 2005 through September 30, 2006, the cap was reached on August 10, 2005. This means that workers seeking new H-1B employment will be unable to obtain H-1B status until the start of the next fiscal year on October 1, 2006 (although employers may submit petitions on their behalf as early as April 1, 2006).

Certain H-1B nonimmigrants are **not** subject to the H-1B cap, including:

- *Those who currently hold H-1B status* and seek to apply for an extension of H-1B status with a current employer or a transfer of H-1B status to another employer;
- *Those who hold a Master’s degree (or higher degree) from a U.S. institution.* Holders of U.S. advanced degrees are subject to a separate cap of 20,000 H-1B visa numbers per fiscal year that has not yet been reached;
- *Those who seek H-1B employment with a U.S. college or university* or a related/affiliated non-profit entity are generally exempt from the cap;
- *Those who seek H-1B employment with nonprofit research organizations<sup>2</sup> or governmental research organizations* are exempt from the cap; and
- *Foreign medical graduates* whose H-1B employment will take place in a medically underserved area of the United States in service of a J-1 visa waiver commitment.

Unless an H-1B beneficiary falls into one of the exempt categories described above, s/he will not be able to obtain H-1B status until October 1, 2006, the start of FY2007. Such beneficiaries are encouraged to apply as soon as possible on or after April 1, 2006 in order to maximize the chance of securing H-1B status before the cap is reached for FY2007.

The limited availability of H-1B status poses obvious hardships to foreign nationals seeking employment in professional occupations and to the businesses that

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<sup>1</sup> Please note that, under the terms of U.S. trade agreements with Chile and Singapore, the Immigration Service must set aside 6,800 of the 65,000 total H-1B numbers available each year for use by nationals of Chile and Singapore. Any of those 6,800 numbers that remain unused at the end of a given fiscal year are then added back into the pool of the available numbers for the following fiscal year. For Fiscal Year 2005, the Immigration Service failed to set aside the 6,800 Chile/Singapore numbers. There are therefore none left to return to the H-1B pool for Fiscal Year 2006.

<sup>2</sup> Note that not *all* non-profit employers are exempt from the H-1B cap: Only those non-profits that are affiliated with an institution of higher learning and/or non-profit *research* organizations qualify for cap exemption.

require their services. To remedy the situation, Congress is currently considering legislation that would permit up to 30,000 additional H-1B numbers unused in prior fiscal years to be “recaptured” and applied to the allotment for FY2006 as well as future fiscal years. An additional fee of \$500 would attach to each of these 30,000 “extra” H-1B numbers. It remains to be seen whether the bill as currently drafted will be enacted into law. McCandlish Holton will continue to track the legislation and post updates as indicated.

If you have further questions about H-1B visa status, please contact your McCandlish Holton immigration attorney.