

Client Alert

A report
for clients
and friends
of the firm April 2004

H-1B Cap for Fiscal Year 2005

On February 17, 2004, United States Citizenship and Immigration Services (USCIS) announced that the cap had been reached for FY 2004 and that it was suspending all H-1B filings subject to the cap for FY 2005. The first day employers were permitted to file H-1B visa petitions for new non-exempt H-1B employees was April 1, 2004. H-1B petitions submitted after this date will be adjudicated with start dates no earlier than October 1, 2004. More importantly, since the H-1B cap for FY 2004 was reached on February 17, 2004, only five months into the FY 2004, it is expected that the carry-over from FY 2004 is going to significantly impact when the 65,000 cap for FY 2005 will be hit. It is projected that the H-1B cap for FY 2005 will be reached by August 2004 at the latest. Furthermore, since 2004 is an election year, we expect that there will be no Congressional action taken on raising the H-1B cap for FY 2005.

Who Is and Is Not Subject to the H-1B Cap for FY 2005?

Cases that count towards the cap include: H-1B's for new employment where the foreign national has not previously held H-1B status or where the foreign national has previously held H-1B status but has been outside of the U.S. for one year or more. In addition, foreign nationals seeking to change status from another nonimmigrant status, such as F-1 or J to H-1B, are also subject to the cap.

Not all H-1B visa petitions, however, are subject to this cap. Foreign nationals who change from one H-1B employer to another, or extend their H-1B visa status are not subject to the FY 2005 cap. In addition, the H-1B cap does not apply to petitions by certain institutions of higher education, nonprofit research organizations, and government research organizations.

Practice Pointers

Since the actual date of the H-1B cap's exhaustion for FY 2005 is not known, but feared to be within the next several months, employers are urged to assess "new hires"

well in advance to determine if the new hires are subject to the H-1B cap. Once it is determined that H-1B visas are required for these foreign national employees, filing the H-1B petition must be initiated as soon as possible. Utilizing the USCIS' premium processing service for an additional \$1,000 fee is also critical to avoid the cap because H-1B cases are charged against the cap as they are approved, not filed.

Department of State Instructs Posts on Issuance of H-1B and H-2B Visas with Deferred Validity Dates

Anticipating the flood of H-1B visa applications at consular posts abroad, the Department of State (DOS) has cabled posts instructing them on procedures for issuing H-1B visas that are subject to the FY 2005 cap. For posts with "significant" H-1B or H-2B processing workload, such as Paris and London, DOS has instructed these posts to issue H-1B or H-2B visas *prior* to September 20, 2004 with annotations as to the validity dates. These visas will be annotated with the language "not valid until (ten days prior to petition validity date)."

For posts with "no significant H-1B or H-2B processing workload," the DOS has instructed these posts "to refrain from visa issuance until ten days prior to the beginning of the holder's DHS-authorized employment." This means that posts with little H-1B or H-2B visa application traffic will *not* begin to issue H-1B visas that are subject to the FY 2005 cap until September 20, 2004, corresponding to 10/01/04 start dates.

U.S. Citizenship and Immigration Services Increases Immigration Benefit Application Fees

On April 15, 2004, USCIS issued regulations revising the fee structure for most immigration benefits. Effective April 30, 2004, this new fee structure adds an average of \$55 to the current cost of immigration benefit applications and increases the biometrics fee by \$20 for certain applications. For example, the fee for one of most widely

utilized petitions for nonimmigrant workers, the H-1B petition, will be increased from \$130 to \$185. The new fee schedule is posted on USCIS' website at: <http://uscis.gov/graphics/publicaffairs/newsrels/USCISFeeStructure.pdf>.

The new revised fee structure is intended to enhance USCIS' services including the significant processing delays of immigration benefits. Commenting on behalf of the USCIS, Director Eduardo Aguirre stated that, "the new fee structure will allow us to enhance service without compromising our commitment to national security." Since 9/11, delays in the processing of applications for immigration benefits have plagued the USCIS. The hardest hit have been some of the employment-based immigrant visa petitions that are currently taking more than 560 days to process as well as employment authorization and travel document applications. Whether the USCIS will enhance its services or accelerate processing immigration benefit applications remains to be seen. The only thing certain at this time is that the fees for immigration benefit applications will increase on April 30, 2004.

Department of Homeland Security to Extend US-VISIT to VWP Travelers by September 30, 2004

On January 5, 2004, the Department of Homeland Security (DHS) implemented the United States Visitor and Immigration Status Indicator Technology Program (US-VISIT). As a technology-based security screening measure, US-VISIT applies to most foreign visitors traveling to the U.S. on a visa and arriving at an air or sea port. Foreign visitors and temporary workers will have their two index fingers scanned and a digital photograph taken to verify their identity at the port of entry. Starting September 30, 2004, this process will also apply to visitors traveling under the Visa Waiver Program (VWP) at all air and sea ports of entry.

As the October 26, 2004 deadline approaches for VWP countries to have machine readable passports including biometric identifiers, the Administration has asked Congress to pass legislation extending this deadline for two years. The Administration's request to extend the deadline is based partly on the start of DHS's processing of VWP travelers in the US VISIT system. In addition, the Administration states technology-related reasons for its request to extend compliance with machine readable passports by VWP countries. Absent this extension, citizens of VWP countries who do not have machine readable passports on October 26, 2004 will need to obtain new passports or apply for a B-1/B-2 visa at a United States embassy.

The following twenty seven countries are currently in the VWP: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway,

Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. (For citizens with the unrestricted right of permanent abode in England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man.)

**NEW YORK LOS ANGELES WASHINGTON
BOSTON BOCA RATON NEWARK PARIS**

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Proskauer Rose counsels in all areas of immigration, nationality and consular law.

For information on this matter, please contact:

Joanne Orizal
973.274.6021 – jorizal@proskauer.com

Proskauer is an international law firm that handles a full spectrum of legal issues worldwide.

1585 Broadway
New York, NY 10036-8299
212.969.3000

2049 Century Park East
32nd Floor
Los Angeles, CA 90067-3206
310.557.2900

1233 Twentieth Street, NW
Suite 800
Washington, DC 20036-2396
202.416.6800

One International Place
14th Floor
Boston, MA 02110
617.526.9600

One Boca Place
Suite 340 West
2255 Glades Road
Boca Raton, FL 33431-7383
561.241.7400

One Newark Center
18th Floor
Newark, NJ 07102
973.274.3200

68, rue du Faubourg Saint-Honoré
75008 Paris, France
331.53.05.60.00

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