

Publications

Immigration Alert: Time to Prepare for April 1 H-1B Filings (2012)

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As you may know, the annual cap for the current fiscal year allocation of H-1B visas was reached on November 22, 2011. Since that time, employers have not been able to file H-1B visa petitions subject to the annual cap. Although any new H-1B visa petitions will not become effective until October 1, 2012, H-1B visa petitions that are subject to the annual cap may be filed as early as April 1, 2012.

Petitions that are subject to the annual cap include H-1B petitions that are filed for first time H-1B beneficiaries and petitions filed for beneficiaries who have previously exhausted the available six years of H-1B admission, have since been outside the United States for one year or more, and are seeking to return to the United States for a new period of H-1B admission. Petitions that are *not* subject to the cap include petitions for beneficiaries who are currently in H-1B status for another employer, have already been counted toward the annual H-1B cap in the six year period prior to the approval of the new petition, beneficiaries who are employed at higher educational institutions and their related or affiliated nonprofit entities, beneficiaries employed by nonprofit research organizations or governmental research organizations, and J-1 nonimmigrant physicians who received a Conrad waiver of the two-year foreign residence requirement based on sponsorship by a state health department.

Note also that employees working pursuant to Optional Practical Training (OPT) often have work authorization that expires in the summer months, prior to the October 1 date where new H-1B visas become available. This has become known as the “cap gap” problem. However, the timely filing of an H-1B visa petition for any employee faced with a cap gap situation automatically extends the employee’s lawful F-1 status and work authorization until October 1, 2012. To be deemed timely, this petition must be filed on or after April 1, 2012 and prior to the expiration of the employee’s current OPT work authorization.

If you think you have a candidate for H-1B status who might be subject to the cap, we encourage you to contact your Vorys attorney as early as possible to discuss the timing of filing the petition.