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US IMMIGRATION & NATIONALITY LAW

USCIS REACHES H-1B MASTERXS CAP FOR FISCAL YEAR 2008

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On May 4, 2007, United States Citizenship and Immigration Services (USCIS) announced that it has received enough H-1B petitions to fill the 20,000 cap for those who have earned master's degrees or higher from a U.S. institution of higher education. The announcement retroactively assigns April 30, 2007 as the "final receipt date" for consideration under this cap. Petitions received on or after May 1, 2007 will be rejected. Petitions received on April 30, the "final receipt date," will be subject to a random selection process.

This announcement signals the exhaustion of cap-subject H-1B visas for Fiscal Year 2008. The 65,000 cap was reached on the first filing day, April 2, 2007, itself. The Master's 20,000 cap was reached on April 30, 2007. The reaching of the caps within the first day and first month of filing, which is long before the October 1, 2007 effective date, truly creates an absurd situation. Those who have missed out will only get a chance to re-file next year starting April 1, 2008 and that too for an effective start date of October 1, 2008. While those who filed under the Master's cap were not subject to a lottery, unless the petition was received on April 30, all of the petitions filed under the 65,000 cap were subject to a random lottery. The chances of winning the 65,000 random lottery is about 50%, and we are already noting that the USICIS has started rejecting H-1B petitions that were not selected under the lottery. It is simply not fair to subject hiring decisions and the careers foreign workers to a random selection process.

Those who have missed the boat could still consider filing through a cap-exempt employer such as an institution of higher education or a nonprofit

organization related to or affiliated with an institution of higher education. Certain nonprofit research organizations or governmental research organizations, as defined in 8 CFR § 214.2(h)(19)(iii) (C), are also exempt from the H-1B cap and so are J-1 foreign medical graduates who received waivers of the two year foreign residency requirement. Moreover, those who are already in H-1B status or who were previously granted H-1B status in the past six years may also not be subject to the cap.

It is important for employers to reach out to their Congresspersons and to alert them that the failure of Congress to do anything will essentially undermine their competitiveness in both the United States and the globalized economy. One of the issues impeding the quick passage of remedial H-1B legislation is that it is conflated with outsourcing and the loss of jobs. Many employers, contrary to this notion, need the H-1B visa to employ skilled and talented foreign workers in the US itself. The H-1B visa also sanctions employers who do not pay wages that are either higher than the prevailing wage or the wage paid to similarly situated workers at the employer's worksite. On the other hand, outsourcing has become a fact of life, and benefits the US in other ways by keeping consumer prices low and thus spurring new kinds of jobs in the US. Thus, if there is any truth to the H-1B visa program at least partially benefiting outsourcing, it should ultimately result in a net benefit to the US too. Furthermore, preventing employers from hiring H-1B workers in the US will encourage them to completely move out of this country, which in turn will result in further job losses of US workers. Thus, the preservation and viability of the H-1B visa is absolutely crucial.

If Comprehensive Immigration Reform passes, it will include a provision to increase H-1B visas. In the unlikely event that CIR fails, Congress should nevertheless consider to independently pass a bill increasing H-1B visa numbers as well as immigrant visas in the Employment-based preferences. Failure to do so will drive out talented foreign workers out of the US to other countries, and the US will only be poorer as a result.

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