



## Immigration Legal Update

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### No April Fools! Don't Let Your Employees be Victims of the H-1B Cap

April 1, 2010, is fast approaching. It is the first day the United States Citizenship and Immigration Service (USCIS) will receive H-1B petitions on behalf of foreign nationals who need H-1B status with a start date of October 1, 2010, which includes individuals who have never had H-1B status and most commonly students in J-1 or F-1 status.

The federal government's 2011 fiscal year commences on October 1, 2010. H-1B petitions may be filed with the USCIS no earlier than six months prior to the requested start date, therefore, H-1B petitions may be received by the USCIS on April 1, 2010, requesting a start date of October 1, 2010.

Due to economic hardships and the related decline in hiring in 2009, H-1B visa numbers remained available for almost nine months. In comparison, in 2008, the annual cap of 58,200 available H-1B numbers was reached within the first several days that the USCIS began accepting H-1B petitions. In past years, when the USCIS received more H-1B petitions than available numbers, the USCIS utilized a lottery system to determine which petitions to accept under the cap. Even if a petition was received on the very first day of filing, there was no guarantee that the petition would be accepted for processing. Further, in 2008, the additional 20,000 available H-1B numbers for those who possess a master's degree or higher from a U.S. educational institution were also used in record time. Accordingly, even if a student has Optional Practical Training (OPT) and a valid Employment Authorization Document (EAD) until May 2011, an employer must file an H-1B petition on the student's behalf for an April 1, 2010 receipt date. If an employer waits too long to file an H-1B petition on behalf of a student who has an EAD valid until May 31, 2011, and is caught outside of the 2011 fiscal year H-1B cap, the employer will have to wait until April 1, 2011, to file an H-1B petition seeking an October 1, 2011, start date. While filing early for H-1B status may result in the loss of a student's OPT time under an EAD, the employer might avoid a situation where the employee may have to leave the U.S. for some period of time.

Previously, some relief was provided to F-1 students in certain situations. The Department of Homeland Security (DHS) issued a rule extending the period of OPT from 12 to 29 months for qualified F-1 nonimmigrant students. The extension is available to F-1 students with a degree in the sciences, technology, engineering or mathematics (STEM degrees) who are employed by

businesses enrolled in the government's E-Verify program. The work authorization of F-1 students with practical training periods, which expire before the allowed H-1B start date of October 1, was automatically extended until September 30 if their H-1B petition was selected in the lottery.

### **Registration has Begun for Temporary Protected Status for Haitian nationals**

The USCIS announced that eligible Haitian nationals in the United States may apply for temporary protected status (TPS) beginning January 21, 2010. On January 15, 2010, Haiti was designated as a country whose nationals are eligible for TPS because of the catastrophic earthquake in Haiti on January 12, 2010. The registration period is open for 180 days, from January 21, 2010, through July 20, 2010. TPS designation for Haiti is effective through July 22, 2011. The designation means that eligible Haitian nationals will not be removed from the United States and will also be eligible to apply to work in the United States. The designation applies only to Haitian nationals who resided in the United States on or before January 12, 2010; TPS will not be granted to Haitian nationals who entered the United States after this date.

Haiti is added to the list of the existing TPS designated countries of El Salvador, Honduras, Nicaragua, Somalia, and Sudan.

### **Establishing employer-employee relationship for H-1B purposes**

A recent memo from the USCIS provides guidance about the requirement that a petitioning H-1B employer establish that an employer-employee relationship exists and will continue to exist with the beneficiary employee throughout the duration of the requested H-1B validity period. This guidance is aimed at H-1B employers who place employees at third-party job sites, such as many IT staffing companies.

The memo clarifies whether an H-1B petition will be approved or denied in situations w an employee is expected to work at a third-party worksite. If a company's business relies on an outside contractor to provide workers who may be in the U.S. in H-1B status, these contract employees may not be able to renew their H-1B status to continue working for the company's business (through their H-1B employer/staffing firm) based on the USCIS memo. If the company w these H-1B workers are working have control over their activities and the company wants to retain their services, the company may need to consider sponsoring the workers directly, because renewing their H-1B status through their H-1B petitioner/employer (staffing firm) may be difficult or impossible.

The key concept in the memo is whether or not the H-1B employer-petitioner has the "right to control" the H-1B beneficiary's work. The memo lists factors that will be considered and the scenarios in which the H-1B petition will be approved or denied related to the control issue, assuming t are no other deficiencies in the H-1B petition.

#### H-1B will be approved:

- Traditional employment w the employee occasionally visits off-site clients.
- Long-term off-site employment w the beneficiary employee reports to petitioning employer's staff and not to third-party clients' staff.
- Long-term off-site employment w the beneficiary using the petitioning employer's proprietary software/processes.

#### H-1B will not be approved:

- Self-employed beneficiary.
- Independent contractors.
- "Job-shop" w the petitioning employer places H-1B employee at third-party off-site clients and the petitioner exercises no control over the beneficiary employee's work.

#### The following are characteristics of a "job shop":

- Petitioning H-1B employer has contracts with many companies in which it supplies staff to these companies.
- These contracts do not list specific positions but are staffed on an as-needed basis.
- H-1B beneficiary is working in a core position. An example in the memo is an IT worker who is working on a client's own payroll software.

- H-1B beneficiary reports to a manager who is an employee of the third-party company.
- The H-1B beneficiary's work assignments are determined by the third-party company. No proprietary information is used.
- The H-1B beneficiary's progress reviews are completed by the third-party company.

**Eleven new countries now eligible to participate in H-2A and H-2B programs**

The Department of Homeland Security (DHS) designated 11 new countries as eligible to participate in the H-2A and H-2B nonimmigrant visa programs, which allow U.S. employers to bring foreign nationals to the United States to fill temporary or seasonal jobs for which U.S. workers are not available.

The 11 newly designated countries-Croatia, Ecuador, Ethiopia, Ireland, Lithuania, The Netherlands, Nicaragua, Norway, Serbia, Slovakia and Uruguay-join 28 previously designated countries eligible to participate in these programs. The complete list of H-2A and H-2B eligible countries now consists of Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Ethiopia, Guatemala, Honduras, Indonesia, Ireland, Israel, Jamaica, Japan, Lithuania, Mexico, Moldova, The Netherlands, Nicaragua, New Zealand, Norway, Peru, Philippines, Poland, Romania, Serbia, Slovakia, South Africa, South Korea, Turkey, Ukraine, United Kingdom, and Uruguay.

On a case-by-case basis, DHS may allow a worker from a country not on the participating country list to be eligible for the H-2A or H-2B program if such participation is in the interest of the United States.

**Visa Bulletin for March 2010**

The Immigration and Nationality Act sets an annual minimum for both family-based and employment-based immigrant visas ("green cards"), prescribed by categories and per-country limits. A prospective immigrant can apply to become a permanent resident only when a visa number is available in his/her respective category. The monthly Visa Bulletin, published by the U.S. Department of State, provides an update on the availability of visa numbers, listing the cut-off priority. Only applicants with a priority date earlier than the cut-off date may be allotted a number.

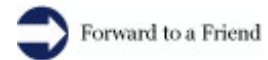
The complete Visa Bulletin is available at the Department of State's website at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4659.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4659.html). Below is an excerpt from the March 2010 Visa Bulletin pertaining to the employment-based categories.

	<b>All Chargeability Areas Except Those Listed</b>	<b>CHINA-mainland born</b>	<b>INDIA</b>	<b>MEXICO</b>	<b>PHILIPPINES</b>
<b>Employment-Based</b>					
1st	C	C	C	C	C
2nd	C	08JUL05	01FEB05	C	C
3rd	15DEC02	15DEC02	01JUL01	01JUL02	15DEC02
Other Workers	01JUN01	01JUN01	01JUN01	01JUN01	01JUN01
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

"C" - current "U" - unavailable

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