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Cap Count for H-1B and H-2B Workers for Fiscal Year 2009

Please see the information relating to H-1B Program Changes for FY 2009 in the Related Links section of this page.

What is a "Cap"

The word "Cap" used in this Update refers to annual numerical limitations set by Congress on certain nonimmigrant visa classifications, e.g., H-1B and H-2B. Caps control the number of workers that can be issued a visa in a given fiscal year to enter the United States pursuant to a particular nonimmigrant classification. Caps also control the number of aliens already in the United States that may be authorized to change status to a cap-subject classification.

H-1B

The H-1B visa program is used by some U.S. employers to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field and a bachelor's degree or its equivalent. Typical H-1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors. The H-1B visa program also includes certain fashion models of distinguished merit and ability and up to 100 persons who will performing services of an exceptional nature in connection with Department of Defense (DOD) research and development projects or coproduction projects. The current annual cap on the H-1B category is 65,000. Not all H-1B nonimmigrants are subject to this annual cap.

H-1B Employer Exemptions

H-1B nonimmigrants who are employed, or who have received an offer of employment, by institutions of higher education or a related or affiliated nonprofit entity, as well as those employed, or who will be employed, by a nonprofit research organization or a governmental research organization are exempt from the cap.

H-1B Advanced Degree Exemption

The H-1B Visa Reform Act of 2004 makes available 20,000 new H-1B visas for foreign workers with a Master's or higher level degree from a U.S. academic institution. For each fiscal year, 20,000 persons who hold such credentials are statutorily exempted from the cap.

Update on Duplicate H-1B Petitions Filed Requesting Fiscal Year 2009 Employment

On March 24, 2008, USCIS published an interim rule in the Federal Register prohibiting H-1B petitioners from filing multiple petitions for the same prospective beneficiary in an effort to increase the chances of receiving an H-1B visa number. The overall goal of the new rule is to ensure that prospective petitioners filing H-1B petitions subject to congressionally mandated numerical limits have an equal chance to employ an H-1B worker. USCIS will deny or revoke all petitions filed by an employer for the same H-1B worker if more than one filing is discovered. If multiple petitions are discovered, whether one or more such petitions are approved, USCIS will data enter all those duplicative petitions, retain all fees, and either deny the petitions or, if a petition was approved, revoke the petition. The petitions will not be returned to the petitioner. As of June 6, 2008, USCIS has discovered that less than 1/2 of one percent of the total H-1B cap eligible petitions received involved duplicate or multiple filings for the same prospective beneficiary.

	Cap	Beneficiaries Approved	Beneficiaries Pending Petitions Received	Beneficiaries Pending Petitions yet to be Received	Total	Date of Last Count
H-1B (FY 09)	58,200 ¹	-----	-----	-----	Cap Reached	4/1/2008
H-1B Advanced Degree Exemption (FY 09)	20,000	-----	-----	-----	Cap Reached	4/1/2008

¹ 6,800 visas are set aside during the fiscal year for the H-1B1 program under the terms of the legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool can be made available for H-1B use with start dates beginning on October 1, 2008, the start of FY 2009. USCIS has added 5,800, the projected number of unused H-1B1 Chile/Singapore visas to the FY 2009 H-1B cap.

H-1B1

An H-1B1 is a national of Chile or Singapore coming to the United States to work temporarily in a specialty occupation. The law defines an H-1B1 specialty occupation as a position that requires theoretical and practical application of a body of specialized knowledge. The beneficiary must have a bachelor's degree or higher (or equivalent) in the specific specialty. The combined statutory limit is 6,800 per year. 1,400 visas are set aside annually for nationals of Chile, and 5,400 for nationals of Singapore. The cap for H-1B1 for FY2009 has not been reached as of the date of this Update.

H-2B

The H-2B visa category allows U.S. employers in industries with peak load, seasonal or intermittent needs to augment their existing labor force with temporary workers. The H-2B visa category also allows U.S. employers to augment their existing labor force when necessary due to a one-time occurrence which necessitates a temporary increase in workers. Typically, H-2B workers fill labor needs in occupational areas such as construction, health care, landscaping, lumber, manufacturing, food service/processing, and resort/hospitality services.

The Save Our Small and Seasonal Businesses Act of 2005 (SOS Act) divided the annual numerical limitations of 66,000 into two halves. USCIS regulations allow for filings 6 months in advance. However, H-2B petitioners first must obtain a temporary labor certification from the Department of Labor (DOL). DOL regulations stipulate that the application for temporary labor certification may not be filed more than 120 days in advance of the need for the employee to ensure the accuracy of the labor market test. Thus, USCIS normally begins receiving H-2B petitions with employment start dates in October in June or July.

What is the H-2B numerical limit set by Congress?

The H-2B numerical limit set by Congress per fiscal year is 66,000. USCIS notes that, as of June 18, 2008, Congress has not amended the "returning worker" provisions of the Save Our Small and Seasonal Businesses Act of 2005 (SOS Act) to cover FY 2009 (before October 1, 2007, if a petition was approved only for the purpose of extending an alien's stay in H-2B status, or only for change or addition of employers or a change in the terms of employment, the worker was not counted against the numerical limit at that time). An alien who changes nonimmigrant status to H-2B is counted against the annual H-2B cap.

	Cap	Beneficiaries Approved	Beneficiaries Pending	Beneficiaries Target ¹	Total	Date of Last Count
H-2B 1st Half	33,000	18,043	11,191	40,000	29,234	7/21/2008
H-2B 2nd Half	33,000 ²	-----	-----	-----	-----	-----
H-2B Annual (FY 09)	66,000 ³	-----	-----	-----	-----	-----

¹ Refers to the estimated numbers of beneficiary applications needed to reach a cap, with an allowance for withdrawals, denials and revocations.

² A shortfall in the 1st half would be made up in the 2nd half.

³ Visas issued plus beneficiaries changing status already in the United States.

H-3

The H-3 nonimmigrant visa category is for aliens who are coming temporarily to the U.S. to receive training (other than graduate medical education or training). The training may be provided by a business entity, academic, or vocational institute. The H-3 nonimmigrant visa category also includes aliens who are coming temporarily to the U.S. to participate in a special education training program for children with physical, mental, or emotional disabilities. There is a limit of 50 visas per fiscal year allocated to H-3 aliens participating in special education training programs. As of June 18, 2008, five of these H-3 visas had been approved with a start date in FY 2008.

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