



**Homeland
Security**

RECOMMENDATION FROM THE CIS OMBUDSMAN TO THE DIRECTOR, USCIS

To: Robert Divine, Acting Deputy Director, USCIS
Cc: Michael P. Jackson, Deputy Secretary

From:: Prakash Khatri, CIS Ombudsman

Date: August 28, 2005

Re: Recommendation to USCIS to publish on a monthly basis the number of nonimmigrant visas issued against the annual numerical limitation on H-1B and H-2B visas under INA Sections 214(g)(1)(A) and (B), including exempted classes that are capped; and to publish such information on a more frequent basis when the numerical cap is projected to be within one month of being reached.

I. RECOMMENDATION

Recommendation to USCIS to publish on a monthly basis the number of nonimmigrant visas issued against the annual numerical limitation on H-1B and H-2B visas under the Immigration and Nationality Act (INA) Sections 214(g)(1)(A) and (B), including exempted classes that are capped, and to publish such information on a more frequent basis when the numerical cap is projected to be within one month of being reached.

II. BACKGROUND

There is an annual numerical cap of 65,000 on H-1B nonimmigrant visas for foreign professionals. H-1B visa holders are employed in a variety of fields including technology, financial services, academics, and healthcare. The H-1B cap, established in 1990, was met on February 17, 2004 for Fiscal Year (FY) 2004, and on October 1, 2004 for FY 2005, which was the first day of the fiscal year. The American Competitiveness and Workforce Improvement Act amended INA Section 214(g) to increase temporarily the number of H-1B nonimmigrant visas available for fiscal years 1999 through 2001. Pub. L. No. 105-277, 112 Stat. 2681 (div. C, title IV). Subsequently, the American Competitiveness in the Twenty-First Century Act (AC21) provided for an elevated H-1B cap level for Fiscal Years 2001 through 2003. Pub. L. No. 106-313, 114 Stat. 1251. Thereafter, the cap reverted to the base level of 65,000, where it remains.

There are a number of statutory exemptions to the H-1B cap. Specifically, the H-1B cap does not apply to H-1B workers employed by institutions of higher education, related or affiliated nonprofit organizations, and nonprofit research or governmental research organizations. The cap also does not apply to H-1B extensions of status with the same company, a petition for a second H-1B, transfers from one H-1B cap-subject employer to another H-1B

employer, or certain H-1B medical doctors who received waivers under AC21 Section 114 (so-called Conrad Waivers).

In addition, the H-1B Visa Reform Act of 2004 provided for exemptions from the H-1B cap for up to 20,000 foreign nationals who graduated from U.S. universities with Master's or higher degrees. Pub. L. No. 108-447. This new provision establishes, in essence, a cap within a cap, and requires USCIS to maintain critical data on the count against this 20,000 annual cap as well.

There is also an annual numerical cap of 66,000 on H-2B nonimmigrant visas for nonagricultural temporary or seasonal workers. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978. H-2B workers are employed in a variety of fields including hospitality, construction, sports and entertainment. The H-2B cap was reached for the first time in FY 2004. USCIS announced that the cap had been reached on March 9, 2004 – less than half-way through the fiscal year – without advance warning and stated at the same time that it would not accept any further H-2B petitions for the remainder of the fiscal year. In FY 2005, USCIS ceased accepting H-2B petitions on January 4, 2005, three months into the fiscal year.

As with the H-1B program, there are statutory exemptions to the H-2B cap. Legislation enacted in May 2005, the "Save our Small and Seasonal Businesses Act of 2005, Pub. L. No. 109-13, exempts employees who have worked in the United States under the H-2B visa program in any one of the past three years and who are returning in FY 2005 or 2006 to work for the same employer. The bill also divides the annual allotment of H-2B visas into two portions, with 33,000 being distributed in the first half of the fiscal year and the remaining distributed in the second half of the fiscal year.

On August 5, 2005, USCIS published the current cap count for these nonimmigrant worker visas, a laudable development that enhanced transparency for visa allocation. It is precisely this type of reporting that the Ombudsman recommends be institutionalized and done on a monthly basis.

In an August 12, 2005 press release, USCIS announced that it had received enough H-1B petitions to meet the congressionally mandated cap for fiscal year 2006. While this announcement concludes overall H-1B cap reporting for FY 2006, USCIS will continue to need to report on the 20,000 exemption for foreign nationals who graduated from U.S. universities with Master's or higher degrees, on the H-2B cap for this fiscal year, and on the H-1B and H-2B caps in coming fiscal years.

III. JUSTIFICATION

USCIS customers, both foreign nationals and employers, rely on the availability of H-1B and H-2B visas to maintain and expand business operations and to ensure the continuity of their immigration status. Providing timely information on the cap count to the public on a regular and predictable basis – *i.e.*, monthly – is critical to businesses and families. Employers that rely on H-1B foreign professionals or H-2B foreign seasonal workers should not have to guess as to how many visa numbers remain in the fiscal year when making important business

decisions. Similarly, foreign nationals should be informed so that decisions about immigration status, employment changes, and studying in the United States can be made deliberately.

In an analogous situation, the Department of State (DOS) is charged with tracking immigrant visa numbers against statutory limits, and DOS provides this information to customers on a predictable monthly basis through publication of the Visa Bulletin. The Visa Bulletin, published online and in other formats, provides transparency to the immigrant visa number allotments, allowing stakeholders to make informed business and family decisions.

IV. BENEFITS

Customer Service:

Customers, both individual foreign nationals and employers, would benefit by knowing when the cap numbers will be reported and by knowing whether the cap will be reached imminently. Employers would be able to plan with greater precision for their workforce needs and foreign nationals would be better able to plan to maintain their individual and families' immigration status.

USCIS Efficiency:

By reporting the H-1B and H-2B cap figures on a regular basis, USCIS would receive fewer inquiries from customers and Congress on cap issues. USCIS would be able to plan and schedule its work on a routine and recurring basis rather than responding to operational exigencies and public consternation when visa categories become unavailable without sufficient warning.

National Security:

This recommendation poses no risks to national security. Providing information to the public on the cap count for H-1B and H-2B nonimmigrant visa categories on a regular basis would have no detrimental impact on national security screening.