

# NEWS UPDATE

October 8, 2010

## **Subject: H and Immigrant Visa Availability**

### **H-1B Availability:**

As of September 24, 2010, USCIS still has more than 25,000 regular cap H-1B visas available, and over 5,000 H-1B visas for individuals with U.S. Master's Degrees. Last year, USCIS did not exhaust the H-1B cap allocation until well into December. Please check to see if your company requires the filing of any new H-1B petitions while they are still available.

Keep in mind that the H-1B cap applies only to first time H-1B visas, and not to foreign nationals switching to another H-1B employer or to H-1B employment at a university or at a non-profit research organization. The cap also **DOES NOT** apply to foreign nationals applying for extensions of stay with the same H-1B employer.

### **H-2B Prevailing Wage Determinations:**

H-2Bs are temporary work visas that are for temporary employment in the U.S.--typically under one year. Most H-2Bs are seasonal workers including a large number of landscaping employees and other seasonal employees.

A U.S. District Court in Philadelphia has invalidated the methodology of the Department of Labor ("DOL") for calculating the prevailing wage rate for H-2B workers. Unless the ruling is stayed by a higher court, DOL has to produce a new methodology within the next four months. DOL has responded by limiting the validity of prevailing wage determinations to 90 days.

The second H-2B visas are divided into two six month periods. The second period begins April 1, 2011. An employer can only start DOL recruitment 120 days prior to the anticipated start date of April 1st. Processing for H-2Bs should start approximately on December 1, 2010. It is important to have in place the prevailing wage determination prior to December 1st. Therefore, Companies anticipating the employment of temporary H-2B workers should start that process no later than November 1, 2010.

### **Employment-based Immigrant Visas:**

USCIS reviews immigrant visas based on employment accordingly to a priority system principally involving three categories. The employment first category (EB1) is for extraordinary aliens, outstanding researchers and multinational managers and executives. The employment second category (EB2) is for foreign nationals holding advanced degrees or the equivalent, as well as for individuals with advanced degrees whose status in the U.S. is determined to be in the national interest. Finally, the employment third category (EB3) is for professionals and skilled workers.

In addition to a priority system, the Department of State ("DOS") further rations employment based immigrant visas based on the country of birth of the foreign national. The quota system for employment based visas has a worldwide

category for all countries that do not reach their country limits. China and India are the two countries that typically reach the country limits for both EB2 and EB3 categories. Mexico reaches the country limits for the EB3 category.

October 1, 2010 marks the beginning of USCIS' Fiscal Year 2011. As of October 1st, the worldwide categories are current (no waiting line) for the EB1 category, as well as for the EB2 category. The EB3 category, however, has a waiting line that is currently more than five years long.

The EB2 category for China and India is in May, 2006, with an anticipated waiting line of over four years. The EB3 category for China is in November, 2003, and for India, January, 2002. Absent legislation, there will continue to be lengthy waiting periods for China and India even in the EB2 category. For Mexican nationals, the EB3 category has over a nine year waiting line at this time.

Overall, we expect slow progress with the immigrant visa categories based on information provided by DOS.

If you have any questions, email us at [contactRS@rudnickspector.com](mailto:contactRS@rudnickspector.com).

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