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DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

[CIS NO. 2308-03]

Information Regarding the H-1B Numerical Limitation for Fiscal Year 2004

AGENCY: Bureau of Citizenship and Immigration Services  
Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice explains how the Department of Homeland Security (DHS), Bureau of Citizenship and Immigration Services (CIS) will process H-1B petitions for new employment for the remainder of Fiscal Year (FY) 2004 now that it is clear that the demand for H-1B workers will exceed the statutory numerical limit (the cap) for H-1B petitions for FY 2004. This notice is published so that the public will understand the procedure for processing H-1B petitions now that the cap is reached, as this procedure may affect the hiring decisions of some prospective H-1B petitioners. These procedures are intended to minimize confusion and burden to employers who use the H-1B program.

DATES: This notice is effective [Insert date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kevin J. Cummings, Business and Trade Services Branch/Program and Regulation Development, Bureau of Citizenship and Immigration Services, Department of Homeland

THE NATIONAL ARCHIVES  
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FEDERAL PUBLIC INSPECTOR  
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IN THE OFFICE OF  
THE FEDERAL REGISTER

Security, 425 I Street, NW., ULLB 3<sup>rd</sup> Floor, Washington, DC  
20536, telephone (202) 305-3175.

**SUPPLEMENTARY INFORMATION:**

**Who is an H-1B nonimmigrant?**

An H-1B nonimmigrant is an alien employed in a specialty occupation or as a fashion model of distinguished merit and ability. A specialty occupation is an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty as a minimum for admission into the United States.

**What is the cap or numerical limitation on the H-1B nonimmigrant classification?**

Section 214(g) of the Immigration and Nationality Act (Act) provides that the total number of aliens who may be issued H-1B visas or otherwise granted H-1B status during FY 2004 may not exceed 65,000. In accordance with the Free Trade Agreements (FTA) for Chile and Singapore, as approved by Congress in Public Laws 108-77 and 108-78, respectively, a total of 1,400 of the 65,000 H-1B numbers are reserved for H-1B1 nonimmigrants from Chile and 5,400 of the 65,000 numbers are reserved for H-1B1 nonimmigrants from Singapore. This effectively reduces the overall number of H-1B numbers that may be used prior to September 30, 2004, to 58,200. Under the FTA legislation,

however, any unused H-1B1 numbers set aside for aliens from Chile and Singapore will be made available between October 1, 2004, and November 15, 2004. There now appears to be a sufficient number of H-1B petitions pending at the CIS Service Centers to reach the adjusted cap for FY 2004. Therefore, as of February 18, 2004, and until April 1, 2004, the CIS will return any petitions requesting an employment start date prior to October 1, 2004.

**What is the effect of this notice?**

This notice explains the CIS procedure for processing H-1B petitions for new employment, which are subject to the H-1B cap, and filed by employers seeking to employ H-1B aliens on or before September 30, 2004.

**Does this procedure apply to all H-1B petitions filed for FY 2004?**

No. The procedure described in this notice relates only to H-1B petitions filed for beneficiaries who are subject to the numerical limitations and will be engaged in "new employment," to commence on or before September 30, 2004. A petition for new employment includes a petition where the alien beneficiary is outside the United States when the H-1B petition is approved or where the alien is already in the United States in another status and is seeking H-1B status, either through a change of nonimmigrant status from within the United States or a notice to

the Consulate of the eligibility for the new status.

Petitions for beneficiaries exempt from the H-1B numerical limitations, amended petitions, and petitions for extension of stay are not affected by this procedure because these petitions do not count against the cap. Likewise, petitions for aliens in the United States who already hold H-1B status, i.e., petitions filed on behalf of an H-1B alien by a new or additional employer, are also not affected by this procedure. This procedure does not relate to petitions filed before October 1, 2004, for employment to commence on or after October 1, 2004.

**What is the CIS procedure for processing H-1B petitions for new employment during the remainder of FY 2004?**

This notice informs the public that there are a sufficient number of H-1B petitions pending at CIS Service Centers to reach the cap of 58,200 for FY 2004. As of February 18, 2004, the CIS will not accept for adjudication any H-1B petition for new employment containing a request for a work start date prior to October 1, 2004. Petitions filed after February 17, 2004 will be returned (along with the filing fee and, if applicable, the premium processing fee) to the petitioner according to 8 CFR 214.2(h)(8)(ii)(E). In accordance with existing regulations, such petitioners may refile those petitions with a new starting date of October 1, 2004, or later.

CIS has established how many H-1B petitions are pending and

will likely count towards the FY2004 statutory limit. CIS will adjudicate all petitions in the pipeline. CIS will adjudicate cases in the order in which they are received. CIS is not suspending premium processing and normal rules applicable to those cases still apply.

**How should a petitioner notify CIS that it wishes to withdraw a petition?**

If a petitioner wishes to withdraw a pending H-1B petition or an approved H-1B petition for new employment, the petitioner should send a withdrawal request to the CIS Service Center where the petition is pending or was filed and approved. The request should be signed by the petitioner or an authorized representative and include the filing receipt number and the names of both the petitioner and beneficiary.

**Does this process apply to H-1B petitions filed for employment to commence on or after October 1, 2004?**

No. Those petitions are not affected by the procedures described in this notice and will be adjudicated in the normal fashion, regardless of whether they are filed after this year's cap is reached. Petitioners are reminded that, pursuant to 8 CFR part 214.2(h)(9)(i)(B), petitions for H-1B classification may not be filed or approved more than six months prior to the requested employment start date. Therefore, petitions filing for work to commence on October 1, 2004 should not be filed

prior to April 1, 2004. H-1B petitions filed for employment to commence on or after October 1, 2004 will be counted, if otherwise chargeable against the annual H-1B cap, against the FY 2005 numerical cap.

**How will CIS treat H-1B petitions that are revoked for any reason other than fraud or willful misrepresentation?**

For purposes of the annual numerical limitation, if an H-1B petition was approved in a prior fiscal year (e.g. FY2000, 2001, 2002, 2003) but revoked in FY2004, that revocation will have no effect on the FY2004 cap and the number will not be restored to the total number of H-1B new petition approvals available for the remainder of FY2004.

However, if an H-1B petition was approved in FY2004 (and the approval was counted against the FY2004 cap), and the H-1B petition subsequently is revoked during FY2004 for any reason other than fraud or willful misrepresentation (e.g. the petitioner goes out of business), that number will be restored to the total number of H-1B petition approvals available for the remainder of FY2004. If the same H-1B petition is revoked for any reason other than fraud or willful misrepresentation after the end of FY2004, CIS will not restore the number to the FY2004 cap.

**How will CIS process H-1B petitions that are revoked for fraud or willful misrepresentation?**

Section 108 of the American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. 106-313 ("AC21"), sets forth the procedure when an H-1B petition is revoked on the basis of fraud or willful misrepresentation. Under AC21, one number shall be restored to the total number of H-1B petition approvals available for the fiscal year during which an H-1B petition is revoked on the basis of fraud or misrepresentation, regardless of the fiscal year in which the petition was approved.


**How will CIS process H-1B petitions that were originally denied but subsequently ordered approved by the Administrative Appeals Office or by a Federal court?**

CIS has considered cases currently on appeal in its determination of cases that could count towards the statutory cap. CIS will process approved petitions in the order that they were originally filed with CIS or the former INS.

**Will CIS refund a filing fee if a petition is withdrawn or revoked?**

No, CIS will not refund the \$130 filing fee when a petition is revoked or withdrawn. The provisions contained in 8 CFR 103.2(a)(1) preclude the refunding of filing fees on Form I-129 petitions in these situations. The CIS will refund a filing fee only if the refund request is based on CIS error or if the petition is filed subsequent to February 17, 2004. It should be

noted that H-1B cap cases filed under the premium processing program are subject to the conditions contained in this notice.



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**Dated:**

William Yates,

Acting Director, Bureau of Citizenship  
and Immigration Services.

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ORIGINAL



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CERTIFYING OFFICER

2-20-04

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