

IMMIGRATION UPDATE

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Mobility | Investment | Compliance

Fiscal Year 2014 H-1B Cap is Reached: Over 124,000 Petitions in Five Days

As a testament to both the improving economy and the need for global talent, over 124,000 [H-1B](#) visa applications were filed within the first five days of the Fiscal Year (FY) 2014 quota opening, all vying for only 65,000 visas. The U.S. Citizenship and Immigration Services (USCIS) [announced](#) that it had received more than the number of H-1B petitions it takes to reach the statutory cap on April 5, 2013. USCIS also stated that the limit had been met for 20,000 H-1B visas that are reserved from the cap based on an advanced degree (Master's cap) exemption. USCIS further [announced](#) on April 8, 2013, that a lottery drawing occurred to select the petitions that would receive the 65,000 H-1B visas available for FY 2014. The last time a lottery system was used to determine which petitioners received H-1B visa numbers was in [April of 2008](#). Any petitions not selected by the lottery, or received after April 5th will be rejected by USCIS and the government will return the petition with all of the filing fees.

In March, USCIS [discussed](#) the possibility and proceeding process should the H-1B quota be filled within the first five days of the H-1B Cap Season. In stark difference, the H-1B cap for Fiscal Year 2013 was not reached until [June 11, 2012](#), over two months after the petitions were accepted for filing. The next date to try your luck at securing an H-1B visa number is April 1, 2014, at which time the petition will be subject to the cap for FY 2015.

H-1B Cap Fulfillment	
Year	Date H1B Cap Reached
H-1B 2003 (FY 2004 cap)	10/01/03
H-1B 2004 (FY 2005 cap)	10/01/04
H-1B 2005 (FY 2006 cap)	08/10/05
H-1B 2006 (FY 2007 cap)	05/26/06
H-1B 2007 (FY 2008 cap)	04/03/07
H-1B 2008 (FY 2009 cap)	04/07/08
H-1B 2009 (FY 2010 cap)	12/21/09
H-1B 2010 (FY 2011 cap)	01/26/11
H-1B 2011 (FY 2012 cap)	11/22/11
H-1B 2012 (FY 2013 cap)	06/11/12
H-1B 2013 (FY 2014 cap)	04/05/13

What about H-1B visa Portability?

The good news is that not all foreign temporary workers are subject to the H-1B cap: the cap only applies to new H-1Bs. This means that companies can hire employees that are already in the U.S. working for other companies on H-1B visas. While a new petition is required, H-1B visa holders or those outside the U.S. who have held an H-1B visa in the past year are exempt from the cap.

What qualifies as a cap-exempt organization and what is the difference compared to a cap-subject organization? Certain employers, including universities and select nonprofits are not subject to the cap, which means that these cap-exempt organizations can actually continue to file H-1B applications. A cap-exempt organization is one of the following organizations:

- an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a);
- a nonprofit entity related to or affiliated with an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a);
- a nonprofit research organization as defined in 8 CFR 214.2(h)(19); or
- a governmental research organization as defined in 8 CFR 214.2(h)(19).

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Are there any options for foreign national sponsorship post-H-1B Cap? If your company wants to sponsor a foreign national employee, there may still be options available.

L Visas are reserved for intra-company transfers of [executives, managers](#) and employees possessing [specialized knowledge](#). In addition, in fields requiring higher degrees or remarkable talent, companies may use an [O Visa](#) to sponsor an employee if it can be shown that the employee possess extraordinary ability in the sciences, arts, education, business, or athletics.

[TN Visas](#) permit Canadian and Mexican citizens to work in the United States as long as the employees meet specified education and/or experience requirements. Employees seeking TN Visas must be working in one of the specified professions on the [NAFTA list](#).

Finally, foreign companies that have invested substantial amounts of capital in a U.S. business can utilize [Treaty Trader](#) and [Treaty Investor](#) Visas (E Visas), where foreign nationals of the [treaty](#) country comprise 50% more of the ownership of the U.S. company and the individual is coming to the U.S. to develop or direct business or bringing an essential skill.

Reaching the cap in just five days provides strong support for the need for increased visa numbers, which was recognized in both President Obama's immigration plan as well as the bi-partisan immigration proposal introduced in February. The increase in H-1B filings will reopen the debate on the demand for H-1B professional workers and a re-examination of the advantages and disadvantages in employing an artificial cap of skilled professional workers at a time when it is crucial that the U.S. be able to compete globally.

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