



New H-1B Filing Rules for 2008

The annual H-1B filing rush is presently underway. The annual quota is woefully inadequate and Congress refuses to take any action to remedy the situation. Empirical evidence shows that for every H-1B worker hired, US employers hire five additional workers, on average, as a result.

This year, for still unexplained reasons, the CIS decided to expand the minimum filing window from two days to five business days. Until this change, the regulations provided that if enough petitions were received to exhaust the annual quota on the first filing day for the new quota, the CIS would continue to accept petitions for an additional

day.

Under the new regulations, if on the first day the CIS receives petitions equal to or greater than the number of visas available in the annual quota, the filing window will remain open for five busi-

This means that all petitions received between Tuesday, April 1st and Monday, April 7th will go into a common lottery pool.

ness days. This year, the filing window will remain open through Monday, April 7, 2008.

This means that all petitions received between Tuesday, April 1st and Monday, April 7th will go into a common pool. The

CIS will then conduct two lotteries from among the petitions in that common pool.

The first lottery will be for petitions filed on behalf of graduates of US colleges and universities with advanced degrees. The CIS will select 20,000 petitions from this group. The remaining advance degree petitions will go back into the pool with all other petitions.

The CIS will then select 65,000 petitions from the unsuccessful advance degree petitions, and all other petitions, to determine the final group of lottery "winners" for 2008.

Important Passport Validity Reminder

Make sure that your passport remains valid beyond the time that you request for your nonimmigrant stay. If your passport expires before the end of your nonimmigrant visa petition date, you will only be given status through the end of your passport's

validity, not the petition validity.

Many people overlook this fact and assume that they will be given status consistent with their petition validity. This can result in serious problems for dependants, who inadvertently

fall out of status as a result of the principal nonimmigrant not maintaining status.

If you cannot renew your passport at this time, be mindful of your I-94 expiration date and do not assume anything.

Inside this issue:

Labor Certification Audits	2
Prospects for immigration legislation	2
Cutoff date movement, CIS productivity and other issues	3
Immigration proposes to increase OPT to 29 months	4

Special points of interest:

- New H-1B filing rules
- Immigration legislation is still possible
- Rapid cutoff date movement again likely
- Immigration proposes to increase OPT out to 29 months.

Labor Certification Audits

The Department of Labor appears to be auditing a majority of the PERM applications that have been filed since the end of the backlog reduction program. We have been told that this is designed to provide training for the employees who had been processing pre-PERM filings, as well as an opportunity for the DOL to validate their fraud profiles.

Whatever the reason, PERM processing has slowed to a crawl in many instances.

In particular, we have noticed that all PERM cases that require a Master's degree, but are O*Net job zone four ratings, are being audited and the employers are being asked to justify the

business necessity for the Master's degree.

On the whole, however, PERM remains a vast improvement over the former system. Determining what constitutes

Whatever the reason, PERM processing has slowed to a crawl in many instances.

acceptable recruiting is much more predictable and processing times, while still unacceptably lengthy, are a fraction of what they were in the years before the PERM system came on-line.

Other than the delays and the incessant audits, the PERM system is working well and is a quick and efficient way to qualify as an employment based immigrant.

Anyone contemplating PERM should plan on at least three months of preparation/recruiting (at a minimum) prior to filing. The actual processing time will vary, depending upon the center where it is filed and the "luck of the draw." We have cases that have been approved in a matter of days, while others have been pending for months.

Prospects for Immigration Legislation

The Congressional Hispanic Caucus continues to hold all immigration legislation hostage until an amnesty bill is voted upon. Given the enormous unpopularity of amnesty, and the fact that this is an election year, it can be taken as absolute certainty that there will not be a vote on an amnesty bill before the November election.

Various business coalitions have spent considerable time and money lobbying for smaller, targeted immigration reform packages. There are a number of packages pending now that have at least some chance of being voted upon, notwithstanding the opposition of the Congressional Hispanic Caucus.

The SAVE act, an immigration enforcement package, has sufficient support to pass the House of Representatives. The House leadership, in deference to the CHC, refuses to bring it to the floor for a vote. The Republicans have circulated a discharge petition to force a vote. If they can collect 218 signatures on their petition, the bill will be brought

to the floor for a vote. Just before the recent break, they had collected approximately 180 signatures.

There is an H-2B relief bill that would substantially increase the H-2B annual quota. It, too, is the subject of a discharge petition and has strong support, particularly among representatives from agricultural states.

A bi-partisan H-1B relief bill proposes to increase the quota to 195,000 for fiscal years 2008 and 2009 as a stop-gap measure until comprehensive immigration reform can be taken up by the Congress next year.

Finally, there is another stop-gap proposal that would "reclaim" 300,000 unused H-1B visa numbers as well as 250,000 wasted employment based immigrant visa numbers and make them available in a floating pool as temporary relief.

There has been a great deal of speculation that the House leadership may take

the SAVE act and bring it to the floor before enough signatures can be collected to force a vote. The idea is that they would add some or all of these other proposals, or even amnesty itself, to the SAVE act to make it unattractive to the original sponsors—thus killing it.

It is doubtful that anything other than amnesty would kill this legislation. There is a serious risk for the Democrats in forcing their members to vote down an amnesty bill. That would undoubtedly alienate one of their core voter constituencies.

If the SAVE bill passes, the likely result is that support for legal immigration reform will increase substantially. A number of members of Congress have said that they support legal immigration reform, but first want to see new enforcement measures put into place.

Cutoff Date Movement, CIS Productivity, and Other Issues

For years, we have seen ever-increasing adjustment of status backlogs at the INS/CIS. Today, the estimated backlog for employment based applications is somewhere between 550,000 and 600,000.

In last month's *ImmInfo Newsletter*, we took a look at visa number availability and the forces that determine cutoff date movement. Central to this issue is CIS productivity.

The CIS has more than enough pending adjustment of status applications to exhaust the annual quota many times over. This being the case, why then does the *Visa Bulletin* show cutoff dates, rather than simply showing each EB category as "unavailable"?

Over the past twelve years, the INS/CIS has wasted more than 600,000 EB quota numbers.

If

the CIS were anything close to efficient, their productivity would be such that they would consume all available EB visa numbers and the *Visa Bulletin* would have to show all (or almost all) categories as "unavailable." Clearly, this is not the case.

It is because of the under performance of the CIS that there are cutoff dates shown and visa numbers available.

The annual employment based quota is 140,000. If the CIS were able to approve 140,000 cases each year, the *Visa Bulletin* would have to show most categories as "unavailable." CIS productivity, however, is so poor that they have never reached this number. When the CIS fails to approve enough cases to use up the annual quota, the "left over" numbers within the quota are wasted—they cannot be carried forward into the next year.

Over the past twelve years, the INS/CIS has wasted more than 600,000 EB quota numbers.

The Department of State, not the CIS, has responsibility for managing the annual quota. To do this, the Department of State sets cutoff dates to govern the flow of adjustment of status and immigrant visa applications. Think of this as similar to betting lines set by oddsmakers in Las Vegas.

If they want to encourage more people to file, they advance the cutoff date. If they want to discourage applications, they regress the cutoff date.

Last year, when it became clear that CIS lack of productivity would likely result in the waste of 40,000 to 60,000 quota numbers, the State Department began rapidly advancing cutoff dates in order to increase the number of filings with consular offices overseas.

As we all recall, by July, all preference categories for all countries became "current" by July. As a result, enough applications were received to allow the State Department posts overseas to make up the difference and approve enough cases to exhaust the quota completely.

That was then, this is now.

This year, all indications point to a similar forward movement of cutoff dates. Whether all categories for all countries will become current is anyone's guess, but it seems pretty clear that we are going to see substantial cutoff date movement between now and July.

Why is this?

Simple. The CIS isn't approving adjustment of status cases at anything close to a rate sufficient to use up even a significant portion of the quota. It seems that once again, the State Department is going to have to step in and act to prevent the waste of large numbers of

visas under the quota.

We need to be careful to distinguish between visa availability and action on pending cases. Many people mistakenly believe that because their AOS cases have been pending for a long time and visa numbers have become current, their applications will be approved. This is a mistaken belief.

It is precisely because the CIS isn't closing (approving) pending cases that visa number cutoff dates are moving forward. The cases getting closed out are the ones pending at consular posts overseas. If the CIS started closing cases the way they should, visa cutoff dates would regress substantially

People who have just started PERM applications may be able to take advantage of the likely advance in cutoff dates this Summer.

and immediately.

People who have just started PERM applications may be able to take advantage of the likely advance in cutoff dates this Summer. The CIS is still accepting combined I-140/I-485 packages (though they have promised to end this practice soon). If your PERM approval comes in at a time when visa cutoff dates have advanced to the point of being "current" you will be able to file for AOS immediately.

Gotcher & Gotcher, LLP

15300 Ventura Boulevard
Suite 507
Sherman Oaks, CA 91403

Phone: 818-990-4922
Fax: 818-804-4074

E-mail: admin@gotcherlaw.com

*Large enough to serve you,
small enough to know you.*

We are a small, customer friendly business immigration law firm. We represent both employers and employees in all fifty states and around the world. We do not charge for discussing possible representation, though we are not available for “second opinions” for those already represented by other attorneys.

We believe that the most important part of our representation is keeping our clients as free of stress as possible while their cases are being processed. To do this, we encourage clients to call us whenever they have questions or concerns. We do not charge any additional fees for these calls. We know that this is a highly stressful period in our clients’ lives and we want to do everything possible to keep them from worrying excessively.

Gotcher & Gotcher, LLP is a certified veteran owned small business. If your company is required to submit an affirmative action plan as part of your federal or state contract bid submission, as a VOSB our firm qualifies as a minority vendor.

Visit us on the web:

www.lmmlinfo.com
www.immigration-information.com

Immigration Proposes to Increase OPT to 29 Months

Immigration and Customs Enforcement (ICE) has just sent proposed regulations to the Office of Management and Budget (OMB) for clearance. These regulations once published, will increase Optional Practical Training (OPT) by 17 months out to a total of 29 months.

OMB review is expected to take approximately three months. There is an excellent chance that the new regulations could be published as early as July.

It is not yet known if this will act to extend existing grants of OPT, though that is extremely probable—at least for students with active OPT at the time the regulation is published.

Students on OPT, and their employers, should understand that FICA withholding should not be made from the student’s paycheck. The IRS explicitly instructs employers in IRS Publication 519 to not withhold FICA from the sala-

ries of full time students. Foreign students engaging in OPT are considered to be full time students for both visa and tax purposes.

This is a significant tax break for both employers and employees. FICA withholding takes 7.5% of the employee’s gross pay and then requires the employer to match that amount. Under the

The new regulations, which could be published as early as July, will increase the maximum period of OPT to a total of 29 months.

IRS rules, neither the employer nor the employee need make these contributions in the case of OPT employees.

The increased OPT time will allow most foreign students to actually begin work toward green cards while on OPT and

likely avoid having to switch to H-1B status.

Unless and until the CIS commits to a program of genuine backlog reduction, we are going to continue to see Visa Bulletin cutoff dates rapidly advance each Spring and Summer. This, in turn, will allow OPT students the opportunity to file for adjustment of status during such advances.