

Cap-exempt H-1B Visas Finally to Be Made Available

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On March 30, 2005, a Department of Homeland Security (DHS) official confirmed that, before the week's end, DHS will publish the long-awaited guidance on filing petitions for the 20,000 H-1B visas that will be exempted from the already-exhausted annual cap for fiscal year 2005 (FY05)—which started October 2004 and runs through September 30, 2005.

Last year, Congress enacted the H-1B Visa Reform Act, creating a new exemption (from the annual cap of 65,000 H-1B visas issued) for 20,000 foreign nationals who hold a master's or other higher degree from a US college or university. The Act made the exemption effective for FY05, and the expectation was that on March 8, 2005, when the other provisions of the Act became effective, the US Citizenship and Immigration Service (USCIS) would begin accepting petitions for the additional visas. However, on March 4, 2005, the USCIS announced that it would reject any applications made prior to it publishing its guidance in the Federal Register. In addition, in a surprise move on March 8, 2005, the USCIS announced that it would **not** limit petitions for the 20,000 additional visas to foreign nationals holding a master's or other higher degree from a US college or university.

Added to this backdrop is information recently released by the USCIS that it approved 10,000 more H-1B petitions for FY05 than it should have, due to the "tremendous spike" in the number of applications received before the start of the fiscal year. Because of this unique and confusing confluence of factors, it is entirely unknown how many further FY05 visas will be issued, and to whom they will be allocated. As a result, employers with H-1B needs for the remaining portion of FY05 who wish to petition for one of the new cap-exempt H-1B visas should immediately seek counsel. While it is uncertain whether or not these visas will be available only for foreign nationals with master's or other higher degrees from US colleges and universities, it is certain that the additional visas will not be available for long.

For more information on this and other immigration matters, contact either of the authors listed above.