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H-1B Cap Met Even Before Filing Window Closes—Why Is There a Cap?

While America is often called the land of opportunity, immigration law often serves as a barrier for many who graduate from U.S. colleges and have to leave the U.S. after they have spent over \$200,000 to be educated here. In an editorial in *The Washington Post*, Facebook and CEO Mark Zuckerberg wrote: “Why do we kick out the more than 40 per cent of math and science graduate students who are not U.S. citizens after educating them? Why do we offer so few H-1B visas for talented specialists that the supply runs out within days of becoming available each year, even though we know each of these jobs will create two or three more American jobs in return?”

In 2013, we saw a significant barrier for over 40,000 highly skilled workers that received the bad news that their H-1B petition would not even be reviewed by United States Citizenship & Immigration Service (“USCIS”) because USCIS received approximately 125,000 H-1B applications for 85,000 spots. This year the exact same thing happened and even before the five day window to submit petitions ended, USCIS announced that they received “sufficient” applications for 85,000 spots and they would run a lottery and select the “winners.” Like last year, the losers will have their petitions returned to them. Even though the H-1B cap is often used up during any given year, Congress has been reluctant to increase the cap to levels that would accommodate a sufficient number of foreign workers.

So why a cap? The longstanding argument to make immigration for highly skilled workers difficult is that it protects American jobs. The key question though is whether a cap accomplishes this. The clear answer is No.

As an immigration lawyer who focuses on business immigration, I can say without a doubt that the H-1B financial, administrative, and compliance requirements alone are more than enough for any employer to select a U.S. worker over a foreign one. Specifically, legal and filing fees for H-1B visas cost approximately \$6,000 and a company that sponsors an H-1B applicant has to pay to return them to their home country if employment terminates. Moreover, there are significant H-1B documentation and compliance requirements that are imposed by the Department of Labor that add a fair amount of administrative and compliance burden to

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enterprises. Finally, the application takes over a month to prepare and a significant amount of this time is devoted to the business entity compiling documentation. So why would a business entity go through all of this if there was a U.S. worker just waiting to be hired? The answer is that they would not.

As I sat again this year preparing H-1B petitions for clients, I had to send all of them a letter like this:

“The U.S. Government has imposed a cap on the number of visas that are issued each year. As there is a high demand for H-1B visas, the cap could be used up in the first 5 business days starting April 1. If the government receives more applications than available visas, they will hold a random lottery and will only process the applications of those selected. The remaining applications will be returned with filing fees.”

While it is apparent that lawmakers cannot agree on comprehensive immigration reform, they should at least agree to fix some of the broken H-1B pieces. I for one do not like sending my clients a “you may have wasted a significant amount of time and money” letter, and eliminating the H-1B cap would go a long way to helping businesses attract talent and manage their businesses. It is time for Congress to act and either eliminate or substantially increase the H-1B cap.

For more practical or legal advice contact **Scott Legal Services, P.C.**. We offer services in a number of business areas including, Immigration, New Business set up, Contract review and development and entrepreneurial support. Call 212-223-2964 or email iscott@legalservicesincorporated.com for a consultation.

Ian E. Scott is a Harvard Law School Graduate, lawyer and author of [Law School Lowdown: Secrets of Success from the Application Process to Landing Your First Job](#). Mr. Scott worked as a corporate litigator in the law firm Cleary Gottlieb and currently runs his own law firm [Scott Legal Services, P.C.](#) specializing in Immigration Law & New Business set-up.