



# Long, Chang & Associates, L.L.P.

## Immigration Attorneys

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## **This Month's Featured Article**

### **H-1B Facts and Figures**

The filing period for new H-1B (specialty occupation) visas started on April 2 and ended on April 3. That's right, in just the first day that employers were able to file for new H-1Bs, the H-1B cap set by Congress was reached. This means that, unless new legislation is passed, no new H-1Bs that are subject to the H-1B cap can be filed until next April for employment beginning in October 2008.

#### **The H-1B Cap**

The H-1B cap set by Congress is 65,000 per fiscal year. The fiscal year for immigration runs from October 1 to September 30. The cap of 65,000 is actually reduced by 6,800 H-1Bs that are reserved exclusively for nationals of Chile and Singapore as a result of tax treaties between the United States and these countries. As a result, the cap is actually only 58,200.

#### **Exemption from the H-1B Cap**

Note that there are certain types of H-1B cases that are entirely exempt from the cap. These types of H-1B cases can still be filed and approved despite the fact that the H-1B cap has already been reached for cap-subject H-1B cases.

Section 214(g) of the Immigration and Nationality Act provides which types of H-1B cases are exempt from the cap. To determine if your H-1B case is exempt from the cap, you should carefully review that section of the law. One of the main exemptions

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## **H-1B Facts and Figures (Continued from Page 1)**

relates to extensions of existing H-1Bs. If an individual is already in H-1B status, this means that he or she has already been counted towards the H-1B cap in the past and would not be counted towards the cap again.

### **The H-1B Lottery Results**

The H-1B regulations provide that if enough H-1B cap-subject petitions are received on the first day of the H-1B filing period, then all cap-subject H-1B petitions received on that day and the next business day will be subjected to a random lottery to allocate all of the H-1B cap numbers.

The earliest filing date for this fiscal year was Monday, April 2, 2007 (six months before the start of the next fiscal year of October 1, 2007). On April 2, 2007, the United States Citizenship and Immigration Services (USCIS) offices in Vermont and California (the only two Service Centers where H-1B petitions are processed) were deluged with H-1B packages. Since the number of H-1B cap-subject petitions exceeded the H-1B cap, USCIS was required by law to accept H-1B petitions on Tuesday, April 3, 2007. USCIS reports that the total number of H-1B cap-subject petitions received on April and April 3 was **123,480**.

After receiving all of the 123,480 cap-subject H-1B petitions on Monday (April 2) and Tuesday (April 3), USCIS had to conduct a random lottery to assign all of the H-1B numbers. Based on the actual cap of 58,200 and the total number of petitions in the lottery (123,480), there was a 47% chance that an H-1B petition would be accepted for processing (58,200 out of 123,480). On Thursday, April 12, 2007, the lottery was conducted and winners have been receiving notifications since that date.

Winning the H-1B lottery only means that USCIS has agreed to receive your H-1B petition and to process the case. It does not mean that your H-1B petition has been approved.

For those who do not win the H-1B lottery, the H-1B packages and all of the filing fees will be returned to them. Due to the high volume of H-1B cases that did not win the lottery and must be returned, it is likely that it will take USCIS several weeks to return the packages and filing fees.

### **Problems with the H-1B Lottery**

There have been reports of certain employers (and their attorneys) filing multiple H-1B petitions for the same employer with the hope that by filing multiple petitions they would increase their chances of being selected in the lottery. The fact that each H-1B petition requires its own set of application fees did not discourage many employers from doing this. Many immigration attorneys have complained that this process is unethical. One USCIS official is reported to have said at a recent meeting between the American Immigration Lawyers Association (AILA) and USCIS that multiple H-1B petitions filed by the same employer for the same foreign national would be receipted (meaning all of the applications would be collected by USCIS) and then denied! It remains to be seen whether or not this will in fact occur.

Another reported problem is that USCIS began issuing premium processing receipts before the H-1B lottery was conducted on April 12, 2007. USCIS has informed the public that any receipts issued or dated before April 12, 2007 for H-1B cap-subject petitions were improper and should be disregarded. So, if you have gotten a receipt for an H-1B cap-subject case, be sure to check the receipt and make sure it is dated April 12, 2007 or later.

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**H-1B Advance Degree Cap Exemption**

For those individuals who did not win the lottery, there still may be hope. The H-1B Visa Reform Act of 2004 provides 20,000 H-1B visas (separate from the regular H-1B cap) for foreign nationals who have graduated from a U.S. university with an advanced degree. An advanced degree is considered a degree beyond a 4-year college degree, such as a Master's degree or Ph.D degree. The 20,000 additional H-1B visas are available in this category until they run out. As of April 16, 2007, the USCIS had received 16,987 cases in this category. While not all of these cases will be approved, it is clear that the 20,000 H-1Bs will not last much longer.

**Proposals to Increase the H-1B Cap**

Finally, if you are subject to the H-1B cap and the advanced degree exemption does not apply, you likely will be out of luck until the next fiscal year (beginning October 1, 2008), unless new legislation in order to increase the cap.

As of April 20, 2007, two separate bills have been introduced in Congress. The "High-Tech Worker Relief Act of 2007" (S. 1092) has been introduced in the Senate. This bill would increase the H-1B cap during fiscal year 2007 (October 1, 2007-September 30, 2008) from 65,000 to 115,000. The cap would be increased to 195,000 visas for fiscal year 2008 and then return back to 65,000 for fiscal year 2009 and subsequent years. The High-Tech Worker Relief Act of 2007 would also make the advanced degree exemption unlimited.

In addition to the "High Tech Worker Relief Act of 2007", the "SKIL Act of 2007" (Securing Knowledge, Innovation, and Leadership Act of 2007) (S. 1083) would also increase the H-1B cap in future years based on the demand in the previous year.

It is important to continue contacting your members of Congress to urge them to increase the H-1B cap! Information on how to contact your members of Congress and sample letters to be used in contacting your Senators and Representatives can be found on our homepage at [www.longchangonline.com](http://www.longchangonline.com). Enter your zip code in the "Write to Congress: button on the middle of the page.

For further updates on the H-1B crisis and other immigration news, visit [www.longchangonline.com](http://www.longchangonline.com)

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**U.S. Citizenship & Immigration Services Press Release: Fiscal Year 2008 H-1B Cap Reached**

The following is a copy of the text of the U.S. Citizenship & Immigration Services Press Release of April 3, 2007, regarding the Fiscal Year 2008 H-1B Cap, which was met on April 2, 2007:

**USCIS REACHES FY 2008 H-1B CAP**

WASHINGTON – U.S. Citizenship and Immigration Services (USCIS) announced today that it has received enough H-1B petitions to meet the congressionally mandated cap for fiscal year 2008 (FY 2008). USCIS will use a random selection process (described below) for all cap-subject filings received on **April 2, 2007** and **April 3, 2007**. USCIS will reject and return along with filing fee(s) all petitions received on those days that are not randomly selected.

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## **USCIS Press Release: FY 2008 H-1B Cap Reached (Continued from Page 3)**

**Cap Procedures:** In keeping with USCIS regulations, USCIS will use the following process to handle H-1B petitions subject to the FY 2008 cap:

- USCIS has determined that as of April 2, 2007, it had received enough H-1B petitions to reach the FY 2008 H-1B cap and has set the "final receipt date" as April 2, 2007.
- In keeping with its regulations, USCIS will subject H-1B petitions received on the "final receipt date" and the following day to a computer-generated random selection process.
- USCIS will reject all cap-subject H-1B petitions for FY 2008 received on or after Wednesday, April 4, 2007.
- USCIS will reject and return along with the filing fee(s) all cap-subject H-1B petitions that are not randomly selected.
- Petitioners may re-submit petitions on April 1, 2008 when H-1B visas become available for FY 2009. This is the earliest date for which an employer may file a petition requesting FY 2009 H-1B employment with a start date of October 1, 2008.

As of late Monday afternoon (April 2), USCIS had received approximately 150,000 cap-subject H-1B petitions. USCIS must perform initial data entry for all filings received on April 2 and April 3 prior to conducting the random selection process. In light of the high volume of filings, USCIS will not be able to conduct the random selection for several weeks.

In order to fully utilize its data entry and initial processing capacity, USCIS may choose to distribute filings received at one service center to other service centers for data entry. In the event that USCIS exercises this option, petitioners may receive receipt notices or other correspondence from a service center other than the one to which the H-1B submission was sent. USCIS advises employers that there is no need for concern should that occur and that there is no need to contact USCIS.

**Cap-Exempt Petitions:** As directed by the *H-1B Visa Reform Act of 2004*, the first 20,000 H-1B petitions filed on behalf of aliens with U.S.-earned masters' or higher degrees are exempt from any fiscal year cap on available H-1B visas. USCIS does not yet know how many of these petitions it has received as those petitions are mixed with the cap-subject cases received on April 2 and 3. USCIS will make a future announcement regarding the "final receipt date" for these petitions.

**Current H-1B Workers:** Petitions filed on behalf of current H-1B workers do not count towards the congressionally mandated H-1B cap. Accordingly, USCIS will continue to process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States.
- Change the terms of employment for current H-1B workers.
- Allow current H-1B workers to change employers.
- Allow current H-1B workers to work concurrently in a second H-1B position.

USCIS also notes that, in addition to the cap exemption for aliens with U.S. earned master's degrees discussed above, certain H-1B petitions are exempt from the cap. Those petitions are not affected by this release.

**H-1B in General:** U.S. businesses utilize the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. As part of the H-1B program, the Department of Homeland Security (DHS) and the Department of Labor (DOL) require U.S. employers to meet specific labor conditions to ensure that American workers are not adversely impacted. The DOL's Wage and Hour Division safeguards the treatment and compensation of H-1B workers.

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## **What is a Conviction for Immigration Law Purposes?**

There are many immigrants who have been convicted of a crime for immigration purposes and don't even know it. Immigrants faced with a criminal charge often hire a criminal law attorney to represent them in the criminal case. In many cases, the immigrant believes that if he has not spent a significant amount of time in jail then he hasn't been convicted of the crime and there is no harmful side effect except for the inconvenience and expense associated with going to court and hiring a criminal defense lawyer. The problem with this thinking is that immigrants need to think not only about what it means to be convicted for criminal law purposes but also what it means to be convicted for immigration law purposes. If an immigrant is convicted for immigration law purposes, there can be severe consequences – denial of a green card, being refused admission or entry to the United States, or even deportation.

Immigration law defines a "conviction" much broader than traditional criminal law. Basic criminal law states that you are convicted only if you have been found guilty by a judge or jury. This is the concept that most people are familiar with. Unfortunately, the immigration laws provide a much broader definition of "conviction".

### **Definition of "Conviction"**

Section 101(a)(48) of the Immigration and Nationality Act defines the term "conviction" as:

*"a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed."*

The immigration law definition of "conviction" has two main prongs:

### **The First Prong**

An immigrant can be "convicted" of a crime for immigration purposes when he or she is found guilty by the court (*"a formal judgment of guilt of the alien is entered by a court"*). Sounds simple enough. This is what most people think of when I ask them, as an immigration attorney, whether they have been convicted of a crime.

### **The Second Prong**

It is the remaining part of the definition of "conviction" that most immigrants are not familiar with. That part of the definition states that, even if there has been no formal judgment of guilty by the court, an immigrant will be considered "convicted" where the following two conditions are met:

(1) There has been a finding of guilt, OR the alien has entered a guilty plea, OR the alien has entered a plea of nolo contendere (no contest), OR the alien has admitted sufficient facts to warrant a finding of guilt;

AND

(2) The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

This means that even if you have not been found guilty, you can be convicted if you admit the facts which are the basis of the crime and some penalty or punishment has been imposed on you by the court. The most common situations in which this occurs are in certain drug offense cases and certain domestic violence cases.

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**Conviction for Immigration Purposes  
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In many cases involving relatively minor drug offenses involving "first offenders" (for example, simple possession of marijuana) the court will give the offender the opportunity to participate in a drug counseling or drug treatment program. In these cases, the criminal charge will be held in abeyance until such time as the drug offender completes this program. Once the program is completed, the drug offender can go back to court and the case often times will be dismissed. In such a case, the drug offender believes that he hasn't been convicted since the criminal charge ultimately was dismissed. While this may be true for criminal law purposes, these types of cases often require the drug offender to admit to the crime or enter a guilty plea as a condition to entering the "first offenders program". By admitting the facts of the crime or entering a guilty plea AND the court requiring you to participate in a drug counseling or drug treatment program (which is considered a form of penalty, punishment or restraint on your liberty), you are considered "convicted" of that crime for immigration law purposes. Remember, this may be true even if your criminal record check shows that the charge was ultimately dismissed.

Similarly, in certain parts of North Carolina, if an individual is charged with domestic violence (or spousal abuse), the court may agree to dismiss this charge where the accused enters a plea of guilty or admits the facts of the case and participates in some sort of anger management program. Again, even if the case is ultimately dismissed, the accused can be considered "convicted" of domestic violence for immigration purposes.

I recently had a case which illustrates this concept. I met with a client who had recently been charged with domestic violence (spousal abuse). He showed me a copy of his criminal record from the county where he was charged. His criminal record showed that the charge was dismissed. He thought there was no problem as a result of the dismissal. I asked him to get a full copy of the criminal file from the courthouse. When he brought it back to me, I noticed that the prosecutor had agreed to enter into a deferred prosecution program whereby the court agreed to dismiss the case against him if he entered a guilty plea and attended anger management classes. He did, and the case was dismissed. However, this resulted in a conviction for immigration purposes. Why? Because he entered a plea of guilty and there was a penalty or restraint on his liberty (the requirement of participating in the anger management classes and paying the court fines). If he had not pleaded guilty, there would not be a conviction for immigration purposes. That is why it is so important to understand what you are signing in court, what you are agreeing to, and how it can impact your future immigration cases.

It is important to note that in this particular case, the individual is actually deportable as a result of this domestic violence conviction since an individual (even a green card holder) can be found deportable under Section 237(a)(2)(E) of the Immigration and Nationality Act for a domestic violence offense which occurs after September 30, 1996.

Based on the foregoing, an immigrant charged with a criminal offense should consider meeting not only with a criminal defense attorney prior to his court date, but also with an immigration attorney to evaluate the potential impact the case may have on his or her immigration future.

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**About Us**

*Long, Chang & Associates, L.L.P. is a full-service immigration law firm concentrating in the areas of employment-based and family-based immigration law. Our law firm has successfully represented individuals and employers through the immigration process with the Immigration and Naturalization Service (INS), Bureau of Citizenship and Immigration Services (BCIS), United States Citizenship and Immigration Service (USCIS) and at U.S. consulates and embassies in order to obtain both non-immigrant (temporary) visas and immigrant (permanent) visas on behalf of individuals or employees.*

\* \* \* \* \*



**Kristen Aekyung Chang** is a founding partner of Long, Chang & Associates, L.L.P. She practices exclusively in immigration law and is a member of the American Immigration Lawyers Association (AILA) and the North Carolina State Bar.

*Born in Seoul, South Korea, Ms. Chang attended the University of North Carolina at Chapel Hill where she received a Bachelor of Arts degree in Psychology. While achieving academic success at the undergraduate level, Ms. Chang devoted much of her time to volunteerism. She served as the Chairperson on the Planning Committee for the University's Bicentennial Class celebration and served as a Research Assistant in the University's Psychology Department where she performed valuable research in the area of cognitive memory. Ms. Chang also volunteered in the school's International Department as an English language assistant for international students and faculty members and at a local psychiatric hospital. In addition to her numerous public-service efforts during her undergraduate career at the University of North Carolina at Chapel Hill, Ms. Chang studied abroad at the prestigious London School of Economics where she achieved the top academic ranking in International Business Strategy and Human Resource Management.*

*Ms. Chang received her J.D. (law) degree from the Wake Forest University School of Law. During law school, Ms. Chang was selected as a member of the Law School's Moot Court Board based on her performance in the school's trial court competition. She was one of three members on the school's nationally-recognized and award-winning National Moot Court Evidence Team. During law school, Ms. Chang studied Labor and Employment Law at the law school's summer program in Italy.*

*Following law school, Ms. Chang opened her own immigration law practice in Greensboro, North Carolina, and subsequently joined Mr. Long in founding Long, Chang & Associates. As a naturalized citizen of the United States, Ms. Chang understands the immigration practice not just as an immigration lawyer but as an immigrant herself who has gone through the immigration process. Based on her personal experiences, Ms. Chang has a remarkable way of relating with her clients and perceiving their anxieties and concerns.*

\* \* \* \* \*



**David J. Long** founded Long, Chang & Associates, L.L.P. in 1998. He has been recognized by the North Carolina State Bar as a Board-Certified Specialist in Immigration Law. Mr. Long is a member of the American Immigration Lawyers Association (AILA) and the North Carolina State Bar. Mr. Long serves as a Mentor for other immigration attorneys through AILA.

*Prior to founding Long, Chang & Associates, L.L.P., Mr. Long worked as an attorney with the law firm of Kilpatrick Stockton in Winston-Salem, North Carolina. Mr. Long practices in the areas of immigration law, corporate law and real estate.*



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*Born in Philadelphia, Pennsylvania, Mr. Long attended the University of North Carolina at Chapel Hill where he studied in the Honors Program and received a Bachelor of Arts degree in Political Science. In addition, Mr. Long studied the Korean Language at Duke University for a semester while attending UNC-CH. Mr. Long graduated magna cum laude and in the top 1% of his class.*

*Mr. Long graduated with highest honors and received his J.D. (law) degree from the Wake Forest University School of Law. During law school, Mr. Long was selected as a member of the Law Review based on his academic standing. He was one of three members on the school's nationally-recognized Gabrielli Family Law Moot Court Team. Mr. Long also studied Labor and Employment Law at the law school's summer program in Italy. Following law school, Mr. Long worked as an attorney in the commercial real estate department of Kilpatrick Stockton LLP in Winston-Salem, NC, one of largest law firms in the United States. After two years of working at a large law firm, Mr. Long desired the opportunity to assist clients on a more personal basis. As a result, he joined Ms. Chang in forming Long, Chang & Associates, L.L.P. Most recently, Mr. Long served as an adjunct faculty member at Handong International Law School in Pohang, South Korea where he taught U.S. Immigration and Naturalization Law.*

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