



## IMMIGRATION ALERT

### **H-1B Visas Have Reached Annual Limit Until October 2006**

#### **The H-1B Cap Has Been Reached for *Non Exempt* Categories: Now What?**

The H-1B annual limit or cap for the period October 1, 2005 through September 30, 2006 (the government's Fiscal Year 2006) was officially reached on August 10, 2005 -- 52 days in advance of the beginning of the actual fiscal year. According to the U.S. Citizenship and Immigration Services (USCIS) press release, all H-1B petitions received on or before August 9, 2005 will be accepted under the FY 2006 cap. A petition received on August 10, 2005 will be assigned a random lottery number to determine if it will be accepted within the 2006 cap. If not, the petition will be returned with the filing fee. While additional visas from the leftover Singapore/Chile allocation will become available on October 1, 2005, no procedure has been established for obtaining those visas.

Under current legislation for cap subject petitions, new H-1B numbers will not become available until October 1, 2006, the start of the next fiscal year. The USCIS has announced that beginning on April 1, 2006 it will start to accept H-1B petitions for processing against the 2006-2007 cap. In other words, you can file H-1B petitions as of April 1, 2006 for a start date of October 1, 2006 or later.

#### **This Cap does NOT apply to H-1B cap exempt petitions.**



As directed by the Visa Reform Act of 2004, USCIS treats as exempt from the cap for any fiscal year the first 20,000 H-1B petitions reflecting an alien beneficiary with a **U.S.-earned master's or higher degree**. For FY 2005 and 2006, USCIS has now received approximately 10,000 and 8,000 of such petitions respectively. USCIS also notes that petitions for new H-1B employment are not subject to the annual cap at all if the alien will be employed at an institution of higher education or a related or affiliated non-profit entity, or at a nonprofit research organization or a governmental research organization. Thus, petitions for these exempt H-1B categories may still be filed for employment start dates in FY 2005 or 2006.

This leaves us with nearly 8 months before we can file another *cap subject* H-1B petition and almost 14 months before such employee can begin work.

In the meantime, what can we do?

## Taking Account of Our Options

While the best possible solution would be a Congressional fix to increase the number of available H-1Bs, that is unlikely. In the meantime, there are a number of “work-arounds” that will allow you to continue to hire qualified foreign national employees in spite of the H-1B cap having been reached.



- **Qualify for Master’s Degree Category?** Does your prospective hire have a U.S. based master’s degree? If so, there are still H-1B visas available. If your prospective hire is still enrolled in a U.S. master’s program he or she may be eligible for Curricular Practical Training (CPT) through the school for part-time employment with your company and, after graduation, may be eligible for full-time employment authorization for up to one year.
- **H-1B Transfers:** Remember, the H-1B cap does not affect individuals who have held H-1B status within the past six years and who have not left the United States for more than one year. Such individuals are already considered to have received an H-1B number and are simply transferring that number to another employer. However, a few points to remember:
  - The person must be maintaining valid H-1B status in order to effect an H-1B transfer without first leaving the United States. That means the person must be able to produce a recent paycheck confirming that the applicant is continuing to work for his or her H-1B employer. If the applicant is not maintaining lawful H-1B status, then you may file the H-1B petition, but the applicant will have to depart the U.S. and re-enter as a condition to coming to work. This is a less timely and efficient approach, particularly if the person needs to obtain an H-1B visa stamp as a prerequisite to re-entry.
  - Remember, some of your job applicants may be in valid H-1B status but working for an “exempt” employer. Current immigration regulations exempt non-profit research institutions and institutions of higher education from the H-1B cap. Because employees of such institutions are “waived” from the H-1B cap, they are never issued an H-1B number. This does not present a problem if your institution is also exempt under the regulations. But if your company is a for-profit enterprise and not properly characterized as a higher education institution or a non-profit research institution, then you cannot transfer a waived H-1B applicant coming from an exempt employer. In other words, you can only transfer an H-1B employee who already has an H-1B number assigned to him or her. For more information on this issue, please see our ImmSTAR Client Alert called “Managing the H-1B Cap” dated April 12, 2004.
- **Individuals with employment authorization valid until at least September 30, 2006:** Students in F-1 status may receive post-graduation Optional Practical Training (OPT) for a period of 12 months (evidenced by possession of valid EAD card). It is safe to hire such individuals if their student-based work authorization will be valid until at least September 30, 2006, since you will be able to file for their H-1B in April 2006 when the new cap numbers become available and in this way create a safe bridge to their future H-1B employment authorization (effective October 1, 2006).



- **Canadians and Mexicans who qualify for TN status:** If your applicant is a citizen of Canada or Mexico and will be coming to the U.S. to fill a position that is listed under the NAFTA schedule, then he or she may qualify for TN status. Remember, there is no cap or limit on the number of TNs that may be granted and the process is relatively quick and straightforward.
- **Nationals of Chile or Singapore:** As above indicated, there is a special allocation of H-1B visas available to nationals of Chile and Singapore that is still available.
- **L-1 “Intracompany Transferees”:** If you have international employees of your company’s foreign affiliate offices who hold managerial positions or who possess “specialized knowledge” of some aspect of your business and have been employed abroad for one year in the preceding three years, then those employees may qualify for transfer under the L-1 visa category.
- **Individuals who qualify for the O-1 classification:** The O-1 category may be used for a wide range of positions and industries provided that the individual has achieved a high level of distinction in his or her field of endeavor. You may wish to consider this category for employees who have achieved a high level of success and notoriety in their careers, such as, researchers, entertainers, or business leaders.
- **J-1 training visa:** If you wish to bring in an employee who will pursue a formal training program of up to 18 months’ duration, you may qualify to sponsor the employee under a J-1 training visa. By working with an agency with authority to issue the Form DS-2019 (required for an application for the J-1 visa), you could make it possible to bring in one or more trainees to work for your company or institution.
- **E-3 Visa for Australians:** The REAL ID Act of 2005 provides for 10,000 E-3 visas for Australian nationals. Australian nationals who qualify for the H-1B visa will also meet the requirements for the E-3 classification. However, the E-3 visa will require less paperwork and significantly lower filing fees. At this time the Department of State and USCIS are finalizing regulations in order to implement the E-3 program. Seyfarth Shaw will provide further guidance on the E-3 visa classification as it becomes available.

If you should have any questions about any of the H-1B cap “work-arounds” listed above, please contact your Seyfarth Shaw representative.



**I’m still so frustrated! What else can I do?**

You can, and should, register your concerns with your legislators. Your company or institution represents an important and powerful constituency, and Senators and Representatives want to hear your position on this issue. You can request that Congress raise the H-1B cap so that we may avoid this problem in the future. In order to avoid an H-1B blackout that will last over 13 months, we encourage you to contact your Senators and Representatives on this issue.

There are fast and easy ways to do this:

- Call your elected officials via the Congressional switchboard (202-224-3121)
- Go to [http://capwiz.com/aila2/mail/oneclick\\_compose/?alertid=5183421](http://capwiz.com/aila2/mail/oneclick_compose/?alertid=5183421) and send an advocacy letter written by AILA (American Immigration Lawyers Association). It will take you less than a minute to complete this information and the letter will be sent directly to each of your state's Senators as well as your Congressional Representative.

There are other advocacy efforts you may wish to pursue, such as initiatives through your trade or professional associations or direct lobbying with your congressional delegation. We encourage you to pursue as many avenues as possible.



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