
# *IMMIGRATION ALERT*

## The Shoe Has Dropped.
## What to Do Now That the H-1B Cap Has Been Reached

### The H-1B Cap Has Been Reached: Now What?

The H-1B cap was officially reached at 8:00 p.m. on Friday, October 1, 2004, thus extinguishing all available "cap subject" H-1B numbers for the 2004-2005 fiscal year. All cap subject petitions received after Friday October 1st will be returned to the petitioner or attorney of record.

Under current legislation, new H-1B numbers will not become available until October 1, 2005, the start of the next fiscal year. The U.S. Citizenship and Immigration Services (USCIS) has announced that beginning on April 1, 2005 it will start to accept H-1B petitions for processing against the 2005-2006 cap. In other words, you can file H-1B petitions as of April 1, 2005 for a start date of October 1, 2005 or later.

This leaves us with a full six months before we can file another cap subject H-1B petition and a full year before an 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 allow for an increase in the number of available H-1Bs, that is uncertain. 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.

- **H-1B Transfers**: Remember, the H-1B cap does not affect individuals who have held H-1B status during the past six years and who have not been outside of 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:

  - In order to benefit from H-1B "portability" (in other words, to be able to go on payroll of the sponsoring employer upon filing of the H-1B petition without the need to await approval of the new petition), the person must be maintaining valid H-1B status. 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 for your company or institution. 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.

- 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, go to www.immstar.com, click on *Immigration Updates* and then *Immigration News*, and view the ImmSTAR Client Alert called "Managing the H-1B Cap" dated April 12, 2004.

- **Individuals with OPT or Academic Training authorization valid until at least September 30, 2005:** 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). Similarly, J-1 scholars may receive post-graduation Academic Training for a period of 18 months (evidenced by Form DS-2019 and an accompanying letter from the school). It is safe to hire such individuals if their OPT or Academic Training will be valid until at least September 30, 2005, since you will be able to file for their H-1B in April when the new cap numbers become available and in this way create a safe bridge to their future H-1B employment authorization.

- **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.

- **Chilean or Singaporean Nationals**: If your applicant is a citizen of Chile or Singapore, then under Free Trade Agreements with those countries an H-1 visa may be available. These so-called "FTA H-1s" are issued on an annual basis, and conversion from the FTA H-1 status to permanent residence status is not permitted. For more information about the FTA H-1s, go to www.immstar.com, click on *Immigration Updates* and then *Immigration News*, and view the ImmSTAR Client Alert called "Managing the H-1B Cap" dated April 12, 2004.

- **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.

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. You can also support a bill pending in Congress that would "carve out" additional H-1B numbers to create an exemption for graduates of U.S. universities who have earned a Master's degree or higher. In order to avoid a year-long H-1B blackout, 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 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 associates or direct lobbying with your congressional delegation. We encourage you to pursue as many avenues as possible. During the current congressional session, there is a strong likelihood that an immigration provision will be "tacked on" to another, unrelated bill. This could have the effect of creating new provisions to the current H-1B regulations that could prevent a similar crisis from occurring again next year.

**Seyfarth Shaw's Business Immigration Group provides periodic information alerts about noteworthy developments in the business immigration field. The information that we provide is of a general nature and should not be interpreted as legal advice applicable to a specific factual situation. If you have questions about the information contained in this Immigration Alert or would like to know more about Seyfarth Shaw's Business Immigration Group and our inbound and outbound visa processing capabilities, please visit our website, www.immstar.com, or contact one of the Business Immigration Group Partners: Jim King (jking@seyfarth.com) in Atlanta; Russell Swapp (rswapp@seyfarth.com) or Dyann DelVecchio (ddelvecchio@seyfarth.com) in Boston; Ric Fischer (Ffischer@seyfarth.com) in Chicago; or Cris Weals (cweals@seyfarth.com) in DC. If you would like to receive our Immigration Alerts, please contact Sarah Compton via e-mail at scompton@seyfarth.com. Thank you.**


**Seyfarth Shaw LLP**
**55 East Monroe Street**
**Suite 4200**
**Chicago, IL 60603**
**ATTN: Client Relations**
**Seyfarth@seyfarth.com**