SEYFARTH ATTORNEYS SHAW LLP

One Minute Memo™

Post-Cap Recap: What Have We Learned?

The United States Citizenship and Immigration Services (CIS) announced on June 1, 2006, that the annual limit on H-1B work permits had been reached one week earlier, as of May 26. Indeed, even cases received on May 26 were not guaranteed a shot at the H-1B work permit but instead would be subject to random selection.

Bottom line: Unless the H-1B work permit request was either received by CIS on May 25 or earlier, or was received on May 26 and then randomly selected, the next available H-1B employment start date would be about sixteen months later -- October 1, 2007 (and even that would require a re-filing on or after April 1, 2007, of the previously returned H-1B application). The H-1B work permit - the veritable workhorse of the U.S. temporary work visa program - just plumb gave out.

This is the fourth consecutive year that the cap has been reached (and the eighth time since 1997). What lessons can employers and H-1B practitioners glean from this latest experience with the dreaded "H-1B cap"?

1. Our Government Takes One Week to Count to 12,000

CIS reported on May 25 that there were about 12,000 H-1Bs remaining. One week later, it reported that in fact, as of May 26, there were no H-1B numbers remaining. CIS explained that there has been a growing lag at its Vermont Service Center (the office to which all H-1B cases are being sent pursuant to the recently implemented "bi-specialization filing program") between the date of delivery of the filings and the date of entry/receipt into its system. When CIS published the May 25 "cap count" indicating that only about 49,000 out of 61,000 H-1Bs had been used as of that date, it neglected to mention that the cap count did not include all cases received as of the May 25 report date.

2. Students Should Get Aggressive in Seeking Evidence of Degree Requirement Completion

Some students in F-1 status graduating with U.S. Bachelor's degrees failed to make the cap because they were waiting to receive evidence that they had completed their degree requirements. Generally, an H-1B request would be denied if the applicant were not qualified as of the date of filing, and there is significant risk that the H-1B request would be returned without some evidence (such as a letter from the academic dean or registrar) confirming that the student had completed all degree requirements. Students should be advised early in the process of the importance of quickly securing a letter or transcript to confirm that degree requirements were satisfied.

3. Employers Can Minimize the Damage to New Hires in Student Status

Many of the H-1B applicants who were caught in the cap are F-1 students who may be eligible to apply for, or may have already received, student-based work authorization for one year. Those students can work until their student work authorization expires, which will likely be in the June to July 2007 time frame. At that point, those students must come off payroll, but they are allowed to remain in the United States for up to 60 days following the expiration of their student employment authorization. Employers can consider providing a leave of absence to permit the student to depart the United States and obtain an H visa stamp to reenter the country to begin work on October 1, 2007 (assuming, of course, that a new H petition had been filed for the student). If feasible, employers could consider sending students to work at foreign affiliate offices to bridge the period between student employment expiration and the new H-1B October 1, 2007, start date.

4. Employers Should Be Alert to Alternative Work Permit Categories

Remember that there are a number of nationalities that benefit from alternatives to the H-1B work permit category. These nationalities include: Australians (E-3 visa); Canadians (TN); Mexicans (TN); Singaporeans (Free Trade Agreement H-1) and Chileans (Free Trade Agreement H-1). Foreign-owned employers may be eligible to sponsor E visas for applicants who share the majority foreign nationality. There may be additional options that are viable.

5. Employers Should Contact Congress

Employers should consider contacting the appropriate senator or representative to urge them to support the H-1B provisions of the Comprehensive Immigration Reform Bill (S. 2611) that was passed by the Senate on May 25, 2006. This bill increases the H-1B cap from 65,000 to 115,000 per fiscal year and allows for a market-based cap increase effective during years in which U.S. employers have an increased need for more H-1B workers. The bill also creates an exemption from the H-1B cap for those persons who have earned a U.S. Master's degree or higher.

If you have any questions about this memo, please contact the Seyfarth Shaw LLP attorney with whom you work or any immigration attorney noted on our website at www.seyfarth.com.

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