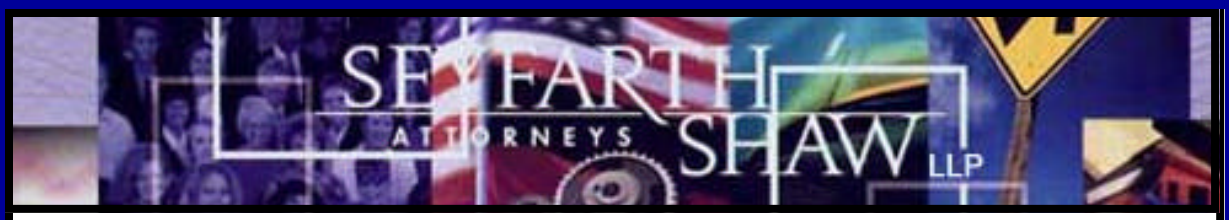
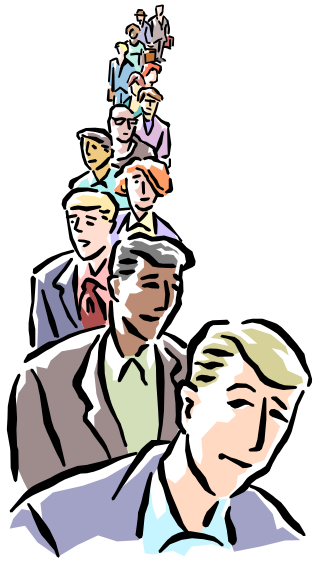


IMMIGRATION ALERT

MANAGING THE H-1B CAP

On February 17, 2004, the "H-1B Cap" for fiscal year 2004 was reached. This prevents employers from sponsoring foreign nationals for new H-1B visa status until the next allotment of 65,000 visas becomes available in FY 2005 (starting October 1, 2004). The H-1B visa is commonly known as the "professional visa" and is frequently used to hire foreign nationals as Software Developers, Researchers, Engineers, Financial Analysts, Teachers, and Executives. This memorandum outlines strategies which should be immediately considered in order to maximize the ability of a U.S. employer to hire a foreign national in H-1B visa status now and in the future.



Processing of Pending H-1B Petitions

United States Citizenship and Immigration Services ("USCIS") announced that H-1B petitions which count against the H-1B Cap filed before February 18, 2004, will be processed in order of receipt. However, USCIS is not suspending the Premium Processing Service which provides a 15-day turn around of an H-1B petition. Though petitions are being processed in order of receipt, in the event that there is a miscalculation in the number of petitions received, using the Premium Processing Service to obtain an early adjudication may be advantageous.

Planning for October 1, 2004

For those that did not meet the February 17, 2004 cut-off date, USCIS will accept H-1B petitions which request a start date of October 1, 2004 as early as April 1, 2004. Given that the H-1B Cap will remain at the same low level of 65,000 for the next fiscal year, we anticipate that new H-1B visa allotments will again run out - - and perhaps far earlier in the fiscal year than February. Under these circumstances it is important to file for H-1Bs as early as possible. In order to take this action, it will be necessary for sponsoring institutions to assess the number of employees in F-1, J-1, or another status who will require a change of status to H-1B.

Foreign Nationals Changing Visa Status

A foreign national who has filed to change status to H-1B after the February 17, 2004 cut-off may need to cease work until the new H-1B status is granted in the fiscal year beginning on October 1, 2004. For example, an F-1 Student whose status will expire on June 15th will need to cease work as of June 16th and continue to do so until the new H-1B status is conferred. If the change of status application was filed before the expiration of the current status, the foreign national will likely be able to remain in the U.S. until the new H-1B status is conferred without accruing unlawful presence. However, while this was expressly confirmed by USCIS in years past, it has not been confirmed at this time. If the application was filed after the expiration of the current status, the employee should depart the U.S. until the H-1B petition is approved. Similarly, if the employee departs the U.S. while the change of status application is pending, the application will be considered "abandoned" and the employee will be forced to remain outside of the U.S. until the H-1B petition is approved. In these last two scenarios, an H-1B visa stamp must be obtained via a U.S. Embassy or Consulate in order to facilitate the foreign national's return to the U.S.

PETITIONS NOT SUBJECT TO THE CAP

Certain requests for H-1B visa status are not subject to the H-1B Cap. These exceptions should be closely reviewed by employers and applied when appropriate in order maximize the ability to hire foreign national talent.

Higher Education and Nonprofit Organizations

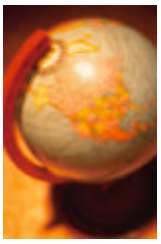
Institutions of higher education, non-profit organizations related to an institution of higher education, non-profit research organizations, and governmental research organizations may continue to sponsor foreign national professionals in H-1B visa status regardless of the H-1B Cap. These organizations were "exempted" from the H-1B Cap provisions by the ACWIA in 1998.

Extensions and Transfers

Foreign nationals currently holding H-1B visa status with a U.S. company are free to file for an extension of that status under the same employer. Likewise, current H-1B visa status holders may transfer H-1B status to a new employer. In both the extension and transfer scenario, a new H-1B visa allotment is not being requested and therefore the H-1B Cap is not relevant. However, when an "exempt" H-1B visa holder - - for example, a professor at a non-profit research institution - - wishes to transfer H-1B visa status to a non-exempt employer, such as a for-profit biotechnology company, a new H-1B visa allotment must be requested and the transfer would count against the H-1B Cap. Such a transfer, filed after February 17, 2004, cannot be approved until October 1, 2004.

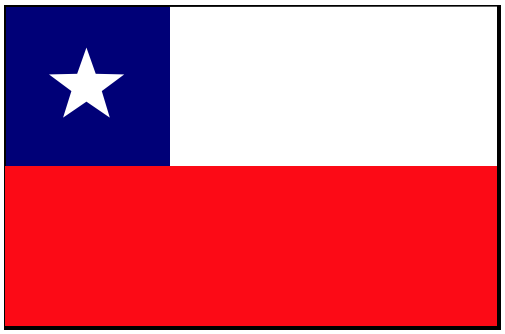
In order to determine whether a foreign national was previously counted against the cap, the Form I-129W

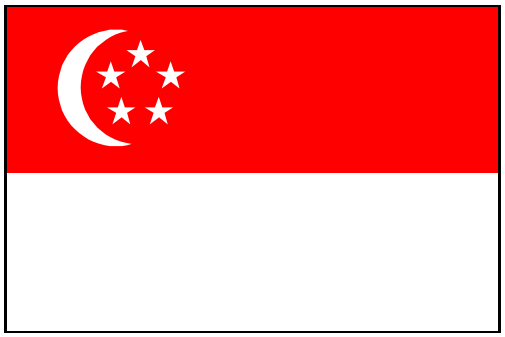
that was filed in connection with his or her current H-1B should be reviewed. If the first three questions in Part B of Form I-129W are marked "yes," then the individual is considered "exempt" from the cap and is currently blocked from making a transfer to a non-exempt employer.



Prior H-1B Status Held

A foreign national who formerly held H-1B visa status and who has not spent one continuous year outside of the U.S. is eligible to obtain H-1B status during the current fiscal year. Under these circumstances, the prior H-1B visa allotment can be "reclaimed" and will not count against the current H-1B Cap. For example, if a former H-1B visa holder changed to F-1 Student status in order to attend a graduate degree program and would now like to take up a new professional position, she may be eligible to resume her prior H-1B status without needing to draw a visa allotment against the H-1B Cap. However, if the foreign national has spent one continuous year outside of the U.S., his or her prior H-1B status is replaced by a new term of status which requires a new H-1B visa allotment.





Citizens of Chile and Singapore

Foreign Trade Agreements signed with Chile and Singapore reserve 1,400 and 5,400 of this fiscal year's H-1B visa allotments, respectively, for citizens of those nations. Therefore, employers may continue to sponsor Chilean and Singaporean citizens for an H-1B work visa. Please note, however, that H-1B visas conferred pursuant to these trade agreements may only be issued in one year increments (rather than the usual three year period) and the sponsored foreign national will not be allowed to pursue permanent residence in the U.S. Any unused H-1B visa allotments under these trade agreement will be made available between October 1, 2004 and November 15, 2004.

Conclusion

Employers must plan ahead and apply creative solutions to the H-1B Cap problem in order to secure and retain foreign national talent. Seyfarth Shaw looks forward to assisting its clients in navigating these complex issues.

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@dc.seyfarth.com) in DC. If you would like to receive our Immigration Alerts, please contact Nicole Kersey via e-mail at (nkersey@seyfarth.com). Thank you.