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Immigration Update – October 4, 2004

Trow & Rahal, P.C. is pleased to provide this Immigration Update as a service to our clients and friends.

H-1B Visa Cap is Hit

The U.S. Citizenship and Immigration Services (USCIS) announced on October 1, 2004 that it has received enough H-1B petitions to use up the entire supply for the next 12 months. The USCIS will continue to process cases that it received before October 1, but it will not accept any new H-1B petitions that are subject to the cap for fiscal year 2005.

The earliest date that a petition can be filed under next year's cap is April 1, 2005, and the earliest date that employment can start is October 1, 2005. This will cause problems for foreign graduates of U.S. universities whose work authorization in F-1 or J-1 visa status expires before October 1, 2005, and for employers that wish to hire other foreign nationals during the next 12 months.

Who Is Not Subject to the Cap?

H-1B visa petitions for people who already hold H-1B visa status do not count towards the cap, so the 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; or
- allow current H-1B workers to work concurrently for another employer.

Also exempt from the cap are H-1B petitions for:

- people who will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization;
- citizens of Singapore and Chile, who are subject to a different cap under the free trade agreements with those countries;

people who have been counted toward an H-1B cap within the past six years, unless they would be eligible for another full six years of admission (i.e., unless they have been outside the U.S. for at least one year); and

physicians who have obtained waivers of the two-year home residence requirement resulting from their J-1 visa status.

What Other Alternatives Are Available?

People who are subject to the H-1B cap may be able to obtain some other temporary visa status that provides work authorization, such as:

TN (NAFTA) visa status for citizens of Canada and Mexico who work in certain occupations, including new hires and entry-level employees

J-1 (Exchange Visitor) and H-3 (Trainee) visa status, typically for entry-level or junior employees

L-1 (Intracompany transferee) visa status for employees transferred to the U.S. from an affiliated company abroad

E-1 (Treaty Trader) or E-2 (Treaty Investor) visa status for employees of certain foreign-owned companies doing business in the United States

O-1 (Extraordinary Ability) visa status for people who have achieved sustained national or international acclaim in their field of employment.

B-1 (Business Visitor) visa status, which is normally used only for short visits to the United States, but can be used in some cases for longer visits where an H-1B visa would otherwise be appropriate.

How Can We Fix This Problem?

We encourage our clients to lobby Congress to increase the supply of H-1B visas, and to provide additional exemptions from the cap. You can use the link below to send emails to your U.S. Senators and Representatives urging them to provide an exemption from the H-1B cap for graduates of U.S. universities who have earned a Master's degree or higher:

http://capwiz.com/aila2/mail/oneclick_compose/?alertid=5183421

This link is provided by the American Immigration Lawyers Association to support a proposal that would remove a large and relatively non-controversial group of applicants from the H-1B cap, allowing the existing supply to go farther.

October 4, 2004

Page 3

If you would like to get more involved in fixing the H-1B cap problem, please contact Trow & Rahal for assistance. We would particularly like to present to Congress examples of how U.S. employers have used H-1B visas to become more competitive in the world marketplace, and how foreign companies have used H-1B visas to open or expand facilities in the United States that create jobs for U.S. workers.

If you have questions about the H-1B cap, or a particular case that may be subject to the cap, please contact one of the Trow & Rahal attorneys listed below.

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