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Immigration Update – June 1, 2006

H-1B Cap Hits Earlier than Anticipated

U.S. Citizenship and Immigration Services (USCIS) announced today that it has received enough H-1B visa petitions to meet the annual limit for Fiscal Year 2007, which starts on October 1, 2006. USCIS has designated May 26, 2006 as the “final receipt date” for H-1B visa petitions for FY2007. H-1B visa petitions that are received by USCIS after May 26 will be rejected, and petitions received on May 26 will undergo a computer-generated, random selection process to determine which ones will be accepted or rejected. Unless Congress acts to increase the H-1B cap, employers whose H-1B petitions are rejected will have to wait until April 1, 2007 to file a new H-1B visa petition for FY2008 with a start date of October 1, 2007 or later.

This announcement does not apply to the separate “advanced degree” cap of 20,000 H-1B petitions per year for people who have Masters or higher degrees from American universities. As of May 25, USCIS reported that approximately 29% of the advanced degree cap has been used.

Today’s announcement comes as quite a surprise! On May 25, only one day before the “final receipt date” announced today, USCIS reported that it had over 9,000 slots remaining for the regular H-1 cap. USCIS has not provided any explanation for how the count could change so quickly.

The USCIS announcement is available at http://www.uscis.gov/graphics/publicaffairs/newsrels/FY07H1BCap_060106PR.pdf.

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 entry-level and experienced employees;
- E-3 visa status (similar to H-1B) for citizens of Australia, pursuant to the free trade agreement with that country;
- 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; or
- 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.

If you have any questions about the information in this newsletter, please contact one of the Trow & Rahal attorneys listed below.

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