



Homeland Security

OCT 21 2005

The Honorable Saxby Chambliss
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of Secretary Chertoff, thank you for your letter of September 20, 2005, regarding U.S. Citizenship and Immigration Service's (USCIS) management of Chile/Singapore H-1B (H-1B1) visa numbers for FY 2005.

While USCIS does not agree with the contention that additional FY 2005 H-1B numbers are or must be available, it appreciates and shares your interest in making sure that the H-1B cap is managed in the most effective way possible.

As your letter recognizes, Congress has established an overall numerical limitation of 65,000 H-1B visas for each fiscal year, up to 6,800 of which are to be allocated to nationals of Chile and Singapore as contemplated in free trade agreements with those countries. *See* 8 U.S.C. § 1184(g)(1)(A)(vii), (g)(8). Congress set up a two-step process for accounting for the Chile and Singapore numbers. As a first step, the annual H-1B limitation of 65,000 must be reduced by the annual numerical limitation established by the Secretary for Chile/Singapore H-1B1 numbers. The second step is to add back to the general H-1B pool any Chile/Singapore H-1B1 numbers that had not been used by at the end of the fiscal year in question. The unused numbers are then to be distributed to the general H-1B population during the first 45 days of the next fiscal year.

As you are aware, USCIS exceeded the 65,000 H-1B visa limitation for FY 2005. USCIS had accepted all H-1B filings between the time the agency announced on September 2, 2004, that as of August 18, 2004, it had received 45,900 H-1B petitions, and the time that it announced that it had reached the cap on October 1, 2004, and would no longer accept petitions. Petitions poured in during the weeks leading up to the October 1, 2004, announcement, resulting in approvals in excess of the total 65,000 H-1B cap for FY 2005. The cap was reached and exceeded, without reserving Chile and Singapore numbers. Consequently, the first step of the process was not accomplished, regardless whether the H-1B1 limitation is 6,800 or a lesser number.

Having not reserved the numbers initially, USCIS cannot fulfill the second step of returning the unused numbers to the H-1B pool. Indeed, exercising the second step now would increase and compound H-1B counting problems, rather than have its intended effect of reconciling the H-1B and the H-1B1 counts. Taking this action would in fact directly contradict the statutory purpose of conforming the actual grants of H-1B and H-1B1 visas to the overall 65,000 cap, because it would simply increase overages above the statutory 65,000 cap, rather than ensure that all available visas have been issued up to, but not in excess of, that number. For these reasons, we respectfully disagree with your view that adding the numbers back in at this point would be authorized, let alone required, by the letter and intention of section 214(g) of the Immigration and Nationality Act.

It is not entirely true that DHS "must set aside 6,800 H-1B visa numbers," as your letter suggests. The statute provides DHS with the authority to establish a lower set-aside than the maximum of 6,800. *See* 8 U.S.C. § 1184(g)(8)(B)(ii) (providing that reserve for Chile/Singapore H-1B1 visas "shall not exceed" 6,800 in total per fiscal year). Demand for Chile/Singapore H-1B1 visas, in fact, fell far short of 6,800 for FY 2005. So, in retrospect, while USCIS did not set aside 6,800 Chile/Singapore numbers, the statutory goals of meeting the Chile/Singapore H-1B1 visa demand and timely issuing H-1B visas to business customers were met. The net result of the agency's actions with respect to the Chile/Singapore H-1B1 visa limitation was that it issued those visas consistent with the pattern of actual demand, and similarly, released H-1B visa numbers consistent with H-1B1 demand. Employers procured needed foreign workers sooner (*i.e.*, based on petitions accepted prior to October 1, 2004) rather than later, and the full allocation (and more) of 65,000 combined H-1B/H-1B1 numbers for FY 2005 was used.

USCIS has made and is continuing to make important improvements to its H-1B cap management program to ensure that the annual H-1B limitation is not exceeded and that appropriate Chile and Singapore numbers are set aside. The agency, however, does not agree that it can now issue more H-1B numbers for FY 2005.

I appreciate your interest in the Department of Homeland Security, and I look forward to working with you on future homeland security issues. If I may be of further assistance, please contact the Office of Legislative Affairs at (202) 205-4412.

Sincerely,



Pamela J. Turner
Assistant Secretary for Legislative Affairs



Homeland Security

OCT 21 2005

The Honorable John Cornyn
United States Senate
Washington, DC 20510

Dear Senator Cornyn:

On behalf of Secretary Chertoff, thank you for your letter of September 20, 2005, regarding U.S. Citizenship and Immigration Service's (USCIS) management of Chile/Singapore H-1B (H-1B1) visa numbers for FY 2005.

While USCIS does not agree with the contention that additional FY 2005 H-1B numbers are or must be available, it appreciates and shares your interest in making sure that the H-1B cap is managed in the most effective way possible.

As your letter recognizes, Congress has established an overall numerical limitation of 65,000 H-1B visas for each fiscal year, up to 6,800 of which are to be allocated to nationals of Chile and Singapore as contemplated in free trade agreements with those countries. *See* 8 U.S.C. § 1184(g)(1)(A)(vii), (g)(8). Congress set up a two-step process for accounting for the Chile and Singapore numbers. As a first step, the annual H-1B limitation of 65,000 must be reduced by the annual numerical limitation established by the Secretary for Chile/Singapore H-1B1 numbers. The second step is to add back to the general H-1B pool any Chile/Singapore H-1B1 numbers that had not been used by at the end of the fiscal year in question. The unused numbers are then to be distributed to the general H-1B population during the first 45 days of the next fiscal year.

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Sincerely,



Pamela J. Turner
Assistant Secretary for Legislative Affairs



Homeland Security

OCT 21 2005

The Honorable Arlen Specter
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

On behalf of Secretary Chertoff, thank you for your letter of September 20, 2005, regarding U.S. Citizenship and Immigration Service's (USCIS) management of Chile/Singapore H-1B (H-1B1) visa numbers for FY 2005.

While USCIS does not agree with the contention that additional FY 2005 H-1B numbers are or must be available, it appreciates and shares your interest in making sure that the H-1B cap is managed in the most effective way possible.

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Sincerely,



Pamela J. Turner
Assistant Secretary for Legislative Affairs



Homeland Security

OCT 21 2005

The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

Dear Senator Leahy:

On behalf of Secretary Chertoff, thank you for your letter of September 20, 2005, regarding U.S. Citizenship and Immigration Service's (USCIS) management of Chile/Singapore H-1B (H-1B1) visa numbers for FY 2005.

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Sincerely,



Pamela J. Turner
Assistant Secretary for Legislative Affairs

United States Senate

WASHINGTON, DC 20510

September 20, 2005

The Honorable Michael Chertoff
Secretary of Homeland Security
United States Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

We write to you regarding how the Department of Homeland Security (DHS) will handle H-1B visa numbers that are to be set aside for Fiscal Year (FY) 2005 for nationals of Chile and Singapore. By statute, unused Chile/Singapore numbers from a fiscal year must be returned to the general supply of numbers available under H-1B. With the next fiscal year quickly approaching, we write to ensure that DHS will make the unused FY 2005 Chile/Singapore H-1B visa numbers available on October 1, 2005.

Section 214(g)(8) of the Immigration and Nationality Act provides instructions for managing the supply of Chile/Singapore H-1B visa numbers. (8 U.S.C. §1184) First, DHS must set aside 6,800 H-1B visa numbers from the regular annual allotment of H-1B visas, reducing the H-1B numerical limitation by that amount. Second, the statute provides that if the Chile/Singapore visa numbers that were set aside are not used "*at the end of a given fiscal year, the Secretary of Homeland Security shall adjust upwards the numerical limitation*" of H-1B visa numbers for that fiscal year. Visas may then be issued from those unused visa numbers within the first forty-five days of the next fiscal year "to aliens who had applied for such visas during the fiscal year for which the adjustment was made."

In every public statement on the issue, DHS has recognized that the statute requires these steps. For FY 2006, DHS explained in a press release issued on August 12, 2005, that "[t]he law provides that any of the unused Chile/Singapore numbers be reallocated *back* to the FY 2006 H-1B cap. These unused numbers will be made available *on October 1, 2006, the start of FY 2007*. The law authorizes USCIS to make such unused numbers available within the first 45 days of FY 2007"¹ Likewise for FY 2004, DHS announced in the Federal Register that it had taken the Chile/Singapore numbers that remained at the end of FY 2004 and restored them to the general FY 2004 supply, in order for issue visas during the first 45 days of FY 2005.² DHS, in a guidance memorandum issued last year, also stated that "since [Chile/Singapore H-1B] numbers are initially deducted from the H-1B cap, any unused [Chile/Singapore H-1B] numbers will be 'added-back' into the H-1B annual cap *at the end of the fiscal year* and not be charged against

¹ U.S. Citizenship and Immigration Services Press Release, "USCIS Reaches H-1B Cap" (August 12, 2005) (emphasis added).

² See 69 Fed. Reg. 68154 (November 23, 2004).

the new fiscal year's H-1B numerical limitation. This 'add-back' procedure is available only during the first 45 days of the new fiscal year ...³

DHS will not know until the end of this fiscal year whether any Chile/Singapore visas remain unused. Should any remain unused, we write to make sure that DHS will make those visas available to aliens who applied during FY 2005. While we understand that DHS previously exceeded the general FY 2005 cap, it would be incorrect for DHS to consider itself already to have reallocated the not-yet-unused, and not-yet available FY 2005 Chile/Singapore visas. This would clearly be contrary to the law and to DHS's past statements.

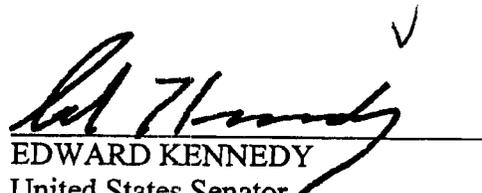
With H-1B visas in such extremely short supply, unused Chile/Singapore visa numbers are precious. The H-1B numerical limitation for FY 2006 was reached on August 10, 2005, weeks before the beginning of the fiscal year. Employers must now wait almost fourteen months to use the services of a needed expert with foreign qualifications. As the statute demands, DHS should make the unused visas available on October 1, 2005, to workers who applied for H-1B visas during FY 2005.

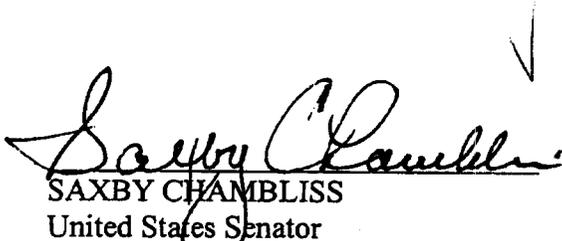
Sincerely,


ARLEN SPECTER
United States Senator


PATRICK LEAHY
United States Senator


JOHN CORNYN
United States Senator


EDWARD KENNEDY
United States Senator


SAXBY CHAMBLISS
United States Senator

³ January 8, 2004 Memorandum for the Regional Directors, "Lifting the Numerical Cap on Mexican NAFTA Nonimmigrants and Free Trade Agreements with Chile and Singapore, p.4 (emphasis added).