

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

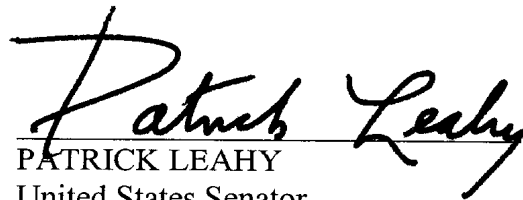
DHS will not know until the end of this fiscal year whether any Chile/Singapore visas remain unused. Should any remain unused, we write to make sure that DHS will make those visas available to aliens who applied during FY 2005. While we understand that DHS previously exceeded the general FY 2005 cap, 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.

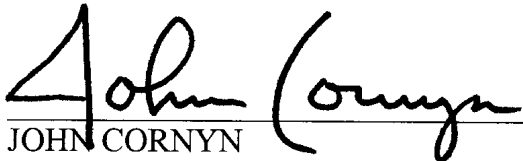
Sincerely,



ARLEN SPECTER
United States Senator



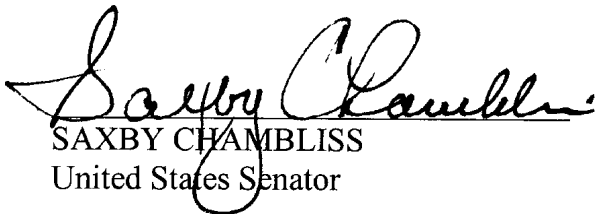
PATRICK LEAHY
United States Senator



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).