ROSNER PARTNERS

COUNSEL FOR CORPORATE IMMIGRATION

- home
- job openings
- staff
- newsletters
- request for consultation
- directions

useful links

- US Citizenship & Immigration Services
- US State Department
- Embassy World
- Department of Labor ETA

Newsletter

Immigration Law Update

Current Developments in Employment-Based Immigration
By Rosner Partners, L.L.C.

Rosner Partners Wishes you a Joyful Holiday and a Happy New Year

December 2007

- **Failure to Use New Form I-9 Will Incur Penalties after 12/26/07**
- **Increased PERM Audits**
- **EB-2 Retrogression for Nationals of India**
- **USCIS Abandons Changes to Renentry Permit Instructions**
- **Department of State Increases Machine Readable VISA Fee**
- **Immigration in the Public Eye**
- **Steep Increase in State Immigration Legislation**
- **E-VERIFY: What is it and should your company be using it?**

This is the latest installment in our efforts to keep you apprised of the rapidly changing U.S. immigration environment. Some of the most recent changes could have a serious impact on you or your employees, and we urge you to communicate these changes to interested parties.

Failure to Use New Form I-9 Will Incur Penalties after 12/26/07

USCIS has announced that the "transition period" for the new Form I-94 (rev. 06/05/07), which has been in effect since November 7, 2007, will expire on December 26, 2007. After this date, employers who fail to use the new form may be subject to all applicable penalties enforced by U.S. Immigration and Customs Enforcement (ICE). Please contact us if you have any questions about the new form, or compliance in the I-9 area.

Increased PERM Audits

At a recent American Immigration Lawyers Association (AILA) Chapter Meeting, a Department of Labor (DOL) representative discussed the DOL's intention to diligently initiate audits of PERM Labor Certifications where job requirements, and particularly educational requirements, are arguably in excess of the standard requirements in the field.

Our office has already witnessed the advent of this increased scrutiny, as applications requiring Master's degrees have received audits across the board in recent months. We expect the trend to continue and are preparing for the increased frequency of audits with filings meticulously crafted to respond to DOL inquiries before they are posed. If you have questions about the audit process, or how an audit affects the processing of a PERM application, please contact our office and we will be happy to assist you.

EB-2 Retrogression for Nationals of India

The Department of State's Visa Bulletin has fluctuated wildly in 2007. Most memorably, the Bulletin announced in June that applicants in all employment-based categories would be eligible to apply for permanent residence in July, and then announced on July 1 that no employment-based applicant was eligible to apply, effectively immediately.

Though the most dire predictions regarding visa availability for the remainder of the year were never met, the July crisis has left foreign nationals and immigration practitioners alike with little faith in the ability of the Department of State and USCIS to coordinate visa availability and publish figures that accurately reflect the number of visas available for the remainder of the fiscal year.

It is this context that we must understand the visa retrogression affecting foreign nationals from India and China in the employment-based second preference (EB-2) category. The EB-2 category is reserved for "Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability." The category has long been a desirable one for nationals of high-chargeability countries, particularly India and China, who face staggering backlogs in the employment-based third preference (EB-3) category reserved for skilled, professional and "other" workers.

The Visa Bulletin for January throws us one final curveball as we approach the end of the year. The EB-2 category for nationals of India and China, which historically has had less of a backlog than the EB-3 category, will retrogress to such an extent that nationals of India will now have a longer wait in the EB-2 category than EB-3. Whether the EB-2 category will remain backlogged is anyone's guess. For now, however, nationals of India seeking employment-based permanent resident status must be aware that they potentially face a years-long wait after filing a Labor Certification application before they are eligible to apply for a green card.

USCIS Abandons Changes to Renentry Permit Instructions

It seems USCIS has disposed of the briefly held requirement that applicants must remain in the United States to complete biometrics to further processing of a reentry permit. The new I-131 instructions (revised 11/16/07) say nothing about biometric processing before issuance of a reentry permit and the instructions specifically say that you may depart the U.S. before a decision is reached on the application.

Department of State Increases Machine Readable VISA Fee

Effective January 1, 2008, the Machine Readable Visa (MRV) fee increases to $131. The $31 increase is the first visa fee increase since 2005 and reflects the fact that, beginning in January, the Department of State will begin paying fees to the FBI for checking fingerprints against the FBI's Integrate Automated Fingerprint Identification System (IAFIS) and for running visa applicant names through Security Advisory Opinion (SAO) processes.

Immigration in the Public Eye

As the nation gears up for the 2008 Presidential Election, the country has positioned immigration as one of the top issues affecting the race and the country today. The Media has responded to the increased public consciousness of immigration as a political issue with articles debating the benefit of immigration to the U.S. economy, culture and society as a whole. The media debate has been heated at times, and often unreliable.

Nevertheless, some articles provide real insight into the problems afflicting the American immigration infrastructure and the forces that prevent meaningful reform. A November 22 article in the *Washington Post*, "Immigrant Paperwork Backs Up at DHS," provides an insightful glance at the Department of Homeland Security's inadequate grasp on American immigration. The article points out that a surge in the number of permanent resident and citizenship applications, compounded by administrative inefficiency and lack of departmental coordination, has created a backlog that may prevent hundreds of thousands of individuals from voting in the 2008 presidential election. The article quotes Representative Zoe Lofgren, a California Democrat and Chair of a House immigration subcommittee, as saying that U.S. Citizenship & Immigration Services (USCIS) has justified "outrageous" fee increases with unfulfilled promises to improve efficiency and speed processing.

There is no denying that the voice of foreign born Americans plays a growing and powerful role in the American consciousness and the conversation on the role of immigration in this country. Whether that voice will be fully heard in the 2008 presidential election remains to be seen.

Steep Increase in State Immigration Legislation

Immigration is traditionally a matter which falls under federal jurisdiction. Like the governance of trade and commerce, the regulation of foreign nationals traveling to the United States is unquestionably a matter of primarily federal concern. Immigration laws affect the nation's economy, our international relationships and our position in the global marketplace. Bowing to the plenary power of Congress in this matter, states have

historically made little motion to develop immigration laws on the state level. Until now.

The mounting presence of immigration as a national concern has been accompanied by a growing perception of the need for immigration reform. The failure of Comprehensive Immigration Reform and Congress' subsequent failure to meaningfully tackle the issue has resulted in many states attempting to address these issues on their own through state legislation. The result is a steep increase in the volume of state legislation relating to immigration, a phenomenon that has serious implications for employers at the state-compliance level, and particularly for employers with sites in many states.

According to a report by the Immigrant Policy Project, as of November 16, 2007, no fewer than 1562 pieces of legislation related to immigrants and immigration had been introduced among the 50 state legislatures. State legislators have introduced almost three times more bills in 2007 than in 2006. The number of enactments from 2006 has nearly tripled in 2007.

With this being the case, it is no longer sufficient to keep abreast solely of federal law to maintain compliance with regulations governing the employment of foreign nationals. Employers increasingly must be aware of nuances in state laws which affect how business may be conducted from state to state. Employers with work sites in more than one state have the even more daunting challenge of keeping track of distinctions at multiple sites, while simultaneously keeping policies uniform and nondiscriminatory. This is particularly applicable in terms of laws governing I-9 compliance.

If you are a multi-state employer or are concerned with the potential effect of state immigration laws on your business practices, we recommend that you contact us to discuss best practices in this difficult area.

E-VERIFY: What is it and should your company be using it?

E-Verify is an internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration. It allows participating employers to verify electronically the employment eligibility of their newly hired employees. In a new policy, DHS has announced that a company with over 1000 employees can choose which work sites to enroll, and is not required to register the entire company, as long as the decision to use E-Verify or not is not discriminatory at any site.

Why use it? If used consistently, E-Verify may be an invaluable tool in establishing a Company's good faith compliance with I-9 requirements. In addition, in some states, such as Arizona, compliance is required to maintain a valid business license. In Tennessee, use of E-Verify offers a safe harbor against a charge of "recklessly hiring an illegal immigrant."

Should your Company be using E-Verify? Please contact us if you would like further information on the program, or to find out if it is required in your state.

For additional information about any of the topics presented here, please **contact us.**

Return to Newsletter Index

Download pdf version

Rosner Partners, Counsel for Corporate Immigration
The Caxton Building • Suite 601 • 812 Huron Road • Cleveland, Ohio 44115 • Map to our Offices
Telephone: (216) 771-5588 • Facsimile: (216) 771-5894 • E-Mail:immigration@rosnerlaw.com