Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner and Associates, L.L.C.

March 1998

This periodic newsletter will feature current developments in employment-based immigration. It is designed to inform you of changes in immigration law that may affect your business.

H-1B CAP TO BE REACHED AGAIN THIS YEAR!!

As you may remember, last year the H-1B cap, the number of H-1B visas which can be issued in any fiscal year, was reached in May. As a result, the U.S. Congress raised the cap from 65,000 to 115,000 for FY1999 and 2000, 107,500 for FY2001, and back down to 65,000 thereafter. Congress also raised the H-1B fee from $110 to $610. The increase must be paid by the U.S. employer, and is intended to help reduce processing backlogs and to fund training programs for U.S. students. We have recently been informed by the Immigration & Naturalization Service (INS) that, despite the new legislation, the cap is likely to be reached sometime between April and June.

We therefore strongly advise all companies who seek to obtain H-1B visas for new employees to begin the application process as soon as possible. Failure to act in a timely manner could result in employees being forced to go off the payroll or to leave the United States until October 1.

If you have any questions regarding the H-1B cap or your company's specific situation, please call Rosner and Associates.

New Filing Procedures for Labor Condition Applications for H-1Bs

The U.S. Department of Labor (DOL) has recently implemented a new procedure for filing Labor Condition Applications (LCA), the prevailing wage documentation which must be submitted with every H-1B visa petition. Previously, the LCA was filed by mail, Federal Express or fax, reviewed by an overworked staff member, and returned via mail or Federal Express. Some DOL Regional Offices were taking up to eight weeks to process and return LCAs, a form which by law is to be processed and returned within 10 days.

In order to alleviate this problem, the DOL has implemented an automated filing system for LCAs. The system requires that the LCAs be completed on a new form using a form filler software program developed by the DOL. If you have not already seen the new form, it is now two pages, but should result in faster processing. The DOL now seeks to process LCAs filed under the new system in as little as one day. So far, they have yet to meet these goals. However, we do believe the new system will be a considerable improvement over the old.

If you have questions regarding the new LCA form, please call Rosner and Associates.

Green Cards for Chinese and Indian Employees

As many of you are aware, U.S. immigration law imposes quotas on the numbers of people from each country who can immigrate to the United States in various categories. Because there are more people from some countries who wish to immigrate than there are visas available, there are significant backlogs for many visa categories.

Each month, the U.S. Department of State (DOS) issues a list of priority dates for each immigrant category. A priority dates is the date on which one files an immigrant visa petition or a labor certification application. If a particular priority date for a classification has not been reached, an individual with a priority date later than the DOS priority date for that classification may not immigrate or adjust his or her status to permanent resident.

In every family-based category (individuals seeking to immigrate based on a family relationship to a U.S. Citizen or Permanent Resident), there is a significant backlog - for Philippine citizen siblings of U.S. Citizens, for example, the backlog is over twenty years. (Note that there is no backlog for immediate relatives of U.S. Citizens - spouses, parents, or unmarried children under 21.) There is also a backlog in some employment-based categories for nationals of certain countries.

Citizens of mainland China and India are subject to a backlog in employment-based categories ranging from two to four years. If you have employees who are citizens of these countries, you should be aware that these backlogs may prevent an employee from remaining in the United States, even if an immigrant visa petition has been approved.

For example, at the present time, a Chinese national who has an approved immigrant visa petition in the third employment-based preference, as a professional with a bachelor's degree, may not file an application to adjust status if his labor certification was filed after February 22, 1995. As soon as his priority date is reached, he may file the application. Until then, he must remain in valid nonimmigrant status. If he runs out of time in nonimmigrant status - for example, he reaches his six year H-1B limit - he may not remain in the United States until his priority date is reached. If he does remain in the United States for more than six months after the expiration of his

nonimmigrant status , he will be unable to adjust his status to permanent resident even when his priority date is reached.

This does not mean that an employee facing a substantial backlog will never be able to obtain permanent residence. Given the lengthy processing times for labor certifications and immigrant visa petitions, there is a good chance the priority date will be reached by the time an immigrant visa is approved. It does mean, however, that employers should be aware of this issue when making decisions regarding immigration benefits for their employees.

To obtain a current list of priority dates, you may contact Rosner and Associates or check the DOS web page at http://travel.state.gov/visa_bulletin.html.

Labor Certification Issues: The Reduction in Recruitment Option

As many of you have recently learned, labor certification processing times are extremely long in some areas of the country. As a result of these processing delays, and the recently announced commitment of the DOL to process "Reduction in Recruitment" (RIR) applications on an expedited basis, we have been advising our clients to seek RIR wherever appropriate. RIR involves a demonstration to the DOL that an employer has adequately tested the labor market in the six months immediately prior to filing the application, and has found that there are no qualified U.S. workers available. RIR applications are processed much more quickly than standard applications, and have the added benefit of allowing the employer to make subjective decisions regarding a job applicant's qualifications, something which is impossible in a standard application.

Companies with technical employees, such as engineers and computer professionals, face a labor market with a shortage of qualified U.S. workers. Chances are that most employers involved in such fields will hire a foreign national at some time. In this period of very low unemployment, potential employees often have a wide variety of offers from which to choose. These potential hires may also bargain for permanent residence as a condition of accepting employment. This being the case, it is important that companies with vacancies for such employees keep detailed records regarding their recruitment activity. Keep track of the sources you use, copies of the ads you place, and record the number of resumes you receive from each source, the number of applicants you interview, the number you hire, and the general reasons for rejecting other applicants.

Be aware that RIR applications must be filed within six months of the recruitment. If you wish to keep a promising employee, you should begin the labor certification process as soon as possible to be eligible for RIR and to avoid priority date problems, as discussed above. You should also remember that even if the recruitment you conducted to hire your foreign national employee is more than six months old, you can use more recent recruitment data for similar positions to apply for RIR. Note that you can also use regional recruitment data. If your company has offices in other parts of the country with similar hiring patterns - offices in the Midwest or New England, for example, you may be able to use the recruitment activities of other offices to strengthen your own RIR application.

Although keeping RIR in mind during the hiring process when you have no obvious foreign national in mind for the position may seem to be a wasted effort, taking the time to document your recruitment efforts may pay off handsomely in the event you do hire such an employee, by substantially reducing the costs associated with labor certification and allowing you to keep a valued employee.

If you have questions regarding RIR, please contact Rosner and Associates for additional information.

INS Raises Processing Fee for Naturalization

Effective for applications filed on or after January 15, 1999, the processing fee for Form N-400, Application for Naturalization, is $225. This fee increase was announced in August of 1998, but did not become effective until January 15. The fee was raised despite INS promises that it would not raise the fee until naturalization processing times were significantly reduced. INS continues to take nearly two years to process naturalization applications.

Rosner and Associates helps corporations to bring foreign nationals to the U.S., and to obtain employment visas for U.S. citizens transferred abroad. We an also assist in obtaining permanent residence (green cards), student and exchange visitor visas, naturalization, and in preventing deportation. Please consider us for your immigration law needs.

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