Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner and Associates L.L.C.

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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 VISA AVAILABILITY WARNING!!

The Immigration & Nationality Act limits to 65,000 the number of new H-1B (professional specialty worker) visas that may be issued in a given fiscal year. As you may be aware, that number was reached during the last fiscal year in mid-August 1997. As a result, new H-1B visas were unavailable until the start of the 1998 fiscal year, which began on October 1, 1997.

As of February 20, 1998, the number of new H-1B visas issued during FY1998 reached 35,000. The INS expects that the 65,000 cap could be reached this year as early as May. This would mean that individuals seeking to enter the U.S. for the first time in H-1B status, or those who seek to change from another status (such as F-1 student) to H-1B will be unable to do so until at least October 1, 1998.

If you currently employ foreign students or exchange visitors whose authorization to work will expire prior to October 1, 1998, we strongly urge you to begin the H-1B visa process immediately for eligible employees you wish to continue to employ. If you do not do so, you may lose the service of valuable workers.

Congress is currently holding hearings on the subject of the H-1B cap. If this matter concerns your business, we strongly advise you to contact your Congressional representatives to voice your opinion as soon as possible.

For additional information, please contact Rosner and Associates.

Plan Ahead for INS and Labor Department Processing Delays

Recent changes in U.S. immigration law and INS processing procedures have resulted in the INS reallocating its resources at its four regional Service Centers. These Service Centers adjudicate the majority of petitions filed with the INS. As a consequence, the processing times for routine matters, including H-1B and L-1 (intracompany transferee) visas and immigrant visa petitions, have increased. Petitions that formerly took two weeks to process can now sometimes take two months to complete. Immigrant visa petitions can take anywhere from a month to three months to adjudicate, and adjustment of status from nonimmigrant to permanent resident can take over a year. It can now take up to 30 days to obtain a Labor Condition Application for an H-1B visa, and labor certification processing may stretch to three years.

When seeking to hire foreign workers, companies should be mindful of these processing times. Advance planning and patience can avoid the consequences of unlawful employment or dashing employee expectations.

Reduction in Acceptable Documents to Prove Work Authorization on Form I-9

Current law requires that an employee present either a document from List A (combined identity and work authorization) or one from each of List B (identity) and List C (employment eligibility) in order to verify employment authorization on Form I-9. The 1996 Illegal Immigration Reform and Responsibility Act ("IIRAIRA") reduced the number of documents which may be used. The INS proposed regulations implementing these changes on February 2, 1998. Some of the documents which have been eliminated include certificates of citizenship and naturalization, reentry permits, and refugee travel documents (List A), Federal, local, school or military identification cards and voter registration cards (List B), and certificates of birth abroad, U.S. birth certificates, and unexpired INS Employment Authorization Documents (List C). (The EAD is still on List A.) Comments on the rule are due on or before April 3, 1998. We will advise you when the rule is finalized and a new Form I-9 becomes available.

Unlawful Presence: What Is It, and What Does it Mean for Your Employees?

IIRAIRA imposed several penalties on individuals who are unlawfully present in the U.S. for certain periods of time. When employing foreign nationals, it is important to be aware of their immigration status, both in the past and in the future to avoid disruptions in your business.

The INS and the Department of State have defined "unlawful presence" to mean any period of stay beyond that authorized on a person's Form I-94, the card an individual completes on entering the United States and which is stamped and stapled in the individual's passport. Penalties for unlawful presence can include the following: (1) if the period of unlawful presence is in excess of 180 days, the individual who subsequently departs the U.S. is inadmissible for three years; (2) if the unlawful presence exceeds one year, the individual who subsequently departs the U.S. is ineligible to reenter the U.S. for ten years; (3) any period of unlawful

presence, regardless of how long or how short, will force the individual to return to his or home country to obtain a visa to enter the U.S. - it is not possible to obtain a visa in Canada, Mexico, or other third country, absent exceptional circumstances; (4) in most cases, a person who has been unlawfully present will be unable to adjust to permanent resident status in the United States - obtaining a "green card" will require the individual to wait in his or her home country for processing. There are exceptions and waivers available in some situations; the most significant of these allows employment-based immigrants to adjust their status if the total period of unlawful presence did not exceed 180 days. However, it is important to ensure that your employees, as well as their dependents, maintain a valid immigration status throughout their employment. Failure to do so could result in your company losing the services of valued employees for months, even years, or in an inability of your employees to travel abroad.

For more information on unlawful presence and its consequences, please contact Rosner and Associates.

Avoiding the Pitfalls of Unauthorized Employment

In recent months, we have become aware that the INS is stepping up its efforts in enforcing the employment eligibility verification requirements, or I-9 rules. Many employers are being served with subpoenas concerning their I-9 records, and are facing substantial penalties for violations.

Employers must understand how to complete Form I-9 and which documents to use to verify employment. As described above, there have been changes to the types of documents which are acceptable evidence of employment authorization.

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.

Rosner and Associates, L.L.C.
The Caxton Building, Suite 601
812 Huron Road
Cleveland, Ohio 44115
216-771-5588
216-77-5894 (Fax)
immigration@rosnerlaw.com

INS Proposed Fee Increases

In January, the INS proposed increases in processing fees for many petitions, including Form I-129 (Nonimmigrant Worker), Form I-140 (Immigrant Worker), Form I-485 (Adjustment of Status), and I-765 (Employment Authorization). The new fee schedule will become effective 60 days after the publication of the final rule, which is not expected until this summer. Some of the new fees are as follows (current fees are indicated in parentheses): Form I-129 - $110 base fee ($75); Form I-140 - $115 ($75); Form I-485 - $220 ($130); Form I-765 - $100 ($70).

We will advise you when the new fees become effective. Please call us if you wish to know about the processing fees for other petitions.