Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner & Associates. L.L.C.

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

January 2004

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. If you have any questions, please do not hesitate to contact us.

H-1B VISA CAP RAPIDLY APPROACHING

If you are or are hiring a foreign national who will need H-1B status, we recommend that you contact us as soon as possible. The number of H-1B visas available for fiscal year 2004 reverted to 65,000 on October 1, 2003. Although it is not possible to predict precisely when the number of available H-1B visas will be exhausted, based on the number of H-1B petitions that have been approved or are currently being processed, it is very likely that this year's H-1B visa "cap" will be reached by mid-February. Those H-1B visa petitions that are subject to the cap and are not approved before the cap is reached will have to wait until October 1 to start employment in H-1B visa status.

The H-1B visa cap applies to all H-1B petitions, except those for an extension of stay, for employees of higher education institutions, nonprofit research organizations or government research organizations, and for Chilean and Singaporean nationals applying for an extension of stay or a change of status to H-1B. Under two new Free Trade Agreements, 1,400 H-1B visas are reserved for citizens of Chile, and 5,400 for citizens of Singapore. Despite the fact that there is almost certain to be a large number of allocated visa slots unused by citizens of Chile and Singapore, these are unlikely to revert to general availability prior to the last quarter of the fiscal year.

For all H-1B workers who are not exempt from the cap, such as foreign students working under optional practical training, it is essential that petitions be filed as soon as possible, via Premium Processing, in order to avoid the possibility of denial on the basis of a lack of available visas. U.S. Citizenship and Immigration Services (USCIS) has indicated that it may suspend the Premium Processing program for H-1B cap petitions, but it has not yet done so.

If you believe that you or one of your employees may be subject to the cap, please contact Rosner & Associates as soon as possible.

CHANGES IN TN VISA PROCEDURES FOR MEXICAN CITIZENS

TN visa application requirements for Mexican citizens have been relaxed. On January 1, 2004, a North American Free Trade Act (NAFTA) provision subjecting Mexican citizens to a 5,500 annual numerical cap, as well as additional procedural requirements, expired. There is now no quota for Mexican TN visa applications, and Mexican applicants are no longer required to obtain approval from USCIS and the Department of Labor prior to applying for TN visas. Mexican citizens may now apply for TN visas directly at a U.S. consulate abroad.

These changes are a considerable improvement over previous procedures for Mexican applicants for TN status. With the expiration of restrictions that have made this visa category unattractive to eligible Mexican applicants, the TN visa category is now a fast and inexpensive alternative for degree-holding professionals who choose not to apply for H-1B visa status.

The Department of Homeland Security reportedly plans to publish an interim rule in the near future that will provide information on the new procedures.

PRESIDENT BUSH PROPOSES NEW "GUEST WORKER" IMMIGRATION PROGRAM

President Bush recently proposed changes to current immigration law that would enable undocumented immigrants in the United States, and foreigners living abroad, to apply for the right to work legally in the United States. His proposal would entitle eligible applicants to three-year visa status with the possibility of at least one extension.

President Bush's proposal has met with enthusiastic support from business leaders, who believe that this type of immigration reform could provide significant benefit to U.S. businesses by providing an influx of legal workers to take jobs that have historically been difficult to fill with U.S. workers. Mexican President Vicente Fox has given the proposal his support, noting that providing legal recognition of Mexican workers in the United States is an important first step in improving border relations between the two countries.

The President's proposal, however, has met with stiff opposition. Some are concerned with the fact that the proposal seems to reward illegal behavior. Immigration advocates express doubt that the proposal in its current form adequately protects the interests of immigrants who seek the benefit of legal status. In particular, they point out that the President's proposal fails to address what will happen to this class of foreign workers at the expiration of their stay. President Bush has not indicated that eligible applicants will be able to apply for permanent residence. To the contrary, he has suggested that workers will be expected to return to their home countries, and has emphasized the temporary nature of the proposed status. Immigration experts caution that anticipating this class of workers to return home at the expiration of their authorized stay is an unrealistic expectation which could cause significant problems in the future.

Critics suggest that the proposal, which has yet to be drafted in legislative form, is unlikely to pass this year, if at all. We will advise you as developments in this area emerge.

USCIS CLARIFIES ROVING H-1B EMPLOYEE ISSUES

U.S. Citizenship and Immigration Services ("USCIS") has issued clarification on how employers may protect the status of H-1B employees who are transferred from one location to another within the U.S., but who work in the same occupation.

USCIS has informally indicated that H-1B workers transferred to a new geographic area who continue to work for the same employer in the same professional position need not file amended H-1B visa petitions provided the employer obtains a certified Labor Condition Application ("LCA") prior to the move. Under these new guidelines, an employer is only required to notify USCIS of the geographic change at the time that an extension is filed. Keep in mind as well that all foreign nationals

in the U.S. must notify the USCIS of a change in residence by filing Form AR-11, available from Rosner and Associates or on the USCIS website, http://uscis.gov.

USCIS cautions that this matter is currently under review and is subject to change. We will notify you in the event that there is any change in this policy.

US-VISIT UNDERWAY

As you may recall from our last newsletter, the Department of Homeland Security recently implemented new procedures at ports of entry into the United States in an attempt to add an additional layer of security to U.S. border control. The program, which requires the use of scanning procedures to collect biometric data at U.S. ports of entry, is called the "United States Visitor and Immigrant Status Indicator" (US-VISIT).

The first phase of US-VISIT became operational on January 5th at 115 airports and 14 seaports across the country. All U.S. ports of entry must employ the US-VISIT program by December 31, 2005.

The program has attracted criticism from opponents who question its effectiveness as a security measure, particularly in relationship to the cost of the program, which is estimated to be $380 million this year. Moreover, critics caution that restrictive programs like US-VISIT have contributed to a 20% drop in foreign visits to the United States, injuring the viability of the tourism industry.

The program has also attracted negative attention from countries that take offense to its mandates. Bangladesh and Indonesia have made official protests to the screening, while Brazil has introduced similar fingerprinting and photographing restrictions on American visitors to that country.

For additional information on US-VISIT and a list of ports of entry using the new program, please consult the DHS website at www.dhs.gov/us-visit.

The "Deemed Export" Classification:

What it is, Who it Affects, and Why it is Important

What it is

In the United States, controlled technology becomes a "deemed export" when it is released to a foreign national located in the United States. Two governmental agencies assume primary responsibility for controlling technology in the United States, including deemed exports. The Commerce Department's Export Administration Regulations (EAR) control most technology used in the development, production, or use of commercial items. The State Department's International Traffic in Arms Regulations (ITAR) control exports related to the military.

Both EAR and ITAR interpret a release of technology to constitute a deemed export when a foreign national gains either visual or oral insights into U.S. technology. It is important to note that this "release" can occur in cases where a foreign national is not working directly with controlled technology, but has access to this information, e.g., through a company Intranet.

With such a broad definition of what is included in the deemed export classification, employers must be increasingly vigilant in ascertaining who has access to information that could potentially require an export license. Potential violations can arise in situations where there is unrestricted server access, or where an unlicensed employee has "Master" access to what is otherwise considered privileged information.

Who it Affects

Deemed Export Requirements apply to all foreign-born employees who are not U.S. citizens, lawful permanent residents, asylees, refugees or foreign nationals in an otherwise protected class. Foreign workers from countries subject to U.S. embargoes, and particularly those countries designated as State Sponsors of Terrorism, will likely require an export license for the release of virtually any EAR controlled technology.

For dual nationals, the Commerce Department has indicated that it considers the last citizenship status obtained to be his or her nationality for the purposes of ascertaining the applicability of deemed export requirements.

Prospective employers should contact a compliance expert in ascertaining whether a license will be necessary in a specific case. Under ITAR, the release of military technology requires a license for virtually all foreign nationals, with very limited exceptions. For EAR-controlled technology, however, the combination of the level of technology involved and the foreign national's home country will determine whether a license is required.

Why it is Important

According to recent reports, the Commerce Department has begun to monitor applications for employment based visas, and particularly H visas, more closely. The Department's Bureau of Industry and Security has conducted sporadic spot checks of foreign nationals who have been granted H visas to work in sensitive industries, including interviews with their employers.

U.S. Customs and Border Protection has begun to focus more energy on its Export Enforcement Program and deemed exports. Companies have reported that CBP officials have conducted random inquiries regarding the relationship between foreign employees and their access to controlled technologies.

The FBI also has become increasingly concerned with the relationship between foreign workers and the release of technology deemed to be an export under the EAR and ITAR. As part of their investigative activities, FBI agents have visited employers, and in particular, large, mainstream companies, in order to learn more about projects on which particular foreign nationals have been working and to ascertain whether or not they are licensed.

Lastly, heightened security at consular posts has made it critically important for U.S. companies looking to employ foreign nationals in high technology fields to exercise special care and foresight in meeting compliance requirements in advance of specific requests to do so. The State Department's increasingly stringent regulations may cause delays in cases where regulations mandate that the consular officer receive clearance before issuing a visa. Checking for compliance with the deemed export regulations at the front end of the visa application process will save time and money in the long run.

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