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.

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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.

The immigration law landscape continues to shift dramatically.

Over the last several months there have been major changes affecting common visa categories (H-1B, L-1), the labor certification process, and new standards for asylum and driver's licenses. It's been a busy time here at Rosner & Associates as we have worked to understand these developments and advise clients how these changes affect their particular circumstances. This newsletter summarizes some of the more significant developments of the past few months.

PERM Labor Certification Process is Finally Here!

The new PERM labor certification system became effective on March 28, 2005 and is to be used for all labor certifications filed after that date. PERM changes quite a few of the previous requirements, but the biggest changes are in processing and recruitment. Those who have filed applications already have revealed quite a few bugs in the new system, but the Department of Labor (DOL) is reportedly working on correcting these flaws.

Processing

Under the PERM system, employers may file an application electronically or by mail. Electronic applications are greatly preferred. Employers must create a PERM account on DOL website, and then must create a sub-account for each attorney which is filing labor certification applications on its behalf. This is a fairly user-friendly system. Although no real problems have been reported with the registration process, delays of one week or more in receiving DOL confirmation of a new account are now routine. For applications not selected for audit, DOL has stated an anticipated processing time of 45-60 days.

Recruitment

Recruitment under PERM is similar to the old RIR procedures. Recruitment must be conducted within the six months prior to filing of the application. In general, the following recruitment must be done: Two Sunday ads in the major metropolitan newspaper for the area of intended employment (an ad in a professional journal may be substituted for one of the Sunday ads) and placement of a 30-day job order with the State Workforce Agency (SWA). A posting of the job opportunity at the worksite for 10 consecutive business days is still required, as well as posting of the job opportunity on the employer's intranet, or other method the company uses to notify its employees of job opportunities. This requirement has caused great concern among many of our clients; nevertheless, it is one which cannot be avoided.

For professional positions, including IT professionals, accountants, engineers, lawyers, etc., three additional recruitment steps are required. The regulations provide 10 alternatives to choose from, including

1. a job search web site, such as monster.com or a newspaper's job site;
2. the employer's web site;
3. a local or ethnic newspaper;
4. job fairs;
5. private employment firms;
6. radio or TV ads;
7. a trade or professional organization;
8. on-campus recruiting;
9. an employee referral program (if such program offers incentives); and
10. campus placement offices.

Employers must choose three different recruitment sources; three uses of the same source are not acceptable.

Prevailing wage determinations

In order to file a labor certification application under PERM, the employer must request a prevailing wage determination from the SWA. This is required even if the employer will use a published or private wage survey. The SWA must approve the use of a survey and provide a written determination of the prevailing wage.

Audits

In another significant change from the previous procedures, supporting documentation is no longer submitted with the labor certification application. All documentation, including resumes, must be retained by the employer for five years in case of an audit by the DOL. Certifying Officers may request an audit of a labor certification either for cause or through random selection procedures. Applications selected for audit will receive a written request from the DOL requiring the submission of additional documentation. Employers will have thirty days to respond. It is important to note that a failure to respond will result in the denial of the application and could, in the discretion of the Certifying Officer, result in a requirement for the employer to engage in DOL-supervised recruitment for all labor certification applications for a two year period. No estimated processing time for audited applications has been provided.

Please note that the new regulations give the Certifying Officer the authority to revoke a previously approved labor certification application at any time, if the CO determines that the approval of the labor certification was not justified due to fraud, willful misrepresentation, obvious errors, or other reasons. The regulations also give the Department of Homeland Security and the Department of State authority to invalidate a labor certification

at any time, if DHS or DOS determines that the application involved fraud or willful misrepresentation of a material fact.

Refiling Pending Applications Under the PERM System

Employers may refile pending labor certification applications under PERM while maintaining the original filing date by withdrawing the pending application and meeting the following conditions: comply with PERM regulations (including recruitment), the new application must be identical to the original application, and a job order must not have been placed for the original application. DOL may find the original and new applications identical if the employer, employer address, alien, job title, job location, job requirements, and job description are identical. The salary/prevailing wage need not be identical. If the request is denied, the application will be considered newly filed, and the applicant will lose the previous priority date.

Applications filed under the old system will continue to be processed at regional offices and backlog reduction centers.

Due to the fact that the new PERM system is in large part automated and has not shown itself to work terribly well, we are advising our clients to postpone filing of labor certification application where it is possible to do so. We hope that within the next few months the DOL will have worked out some of the bugs, and that we will have additional information which will enable us to navigate the system more effectively.

Four Level System Implemented for Prevailing Wages

A four-level system has replaced the old two-level system used to determine prevailing wages for H-1B petitions and labor certification applications. These four skill levels are based upon experience, education and level of supervision the job requires. Prevailing wage determinations will continue to be made by State Workforce Agencies. Prevailing wage determinations are valid for H-1B petitions and/or labor certification applications no less than ninety days and no more than one year. If an employer disagrees with a prevailing wage determination, it may file a new request, file supplemental information, or appeal the determination.

H-1B Update

Effective March 8, 2005, Congress authorized 20,000 new H-1B visas limited to applicants with US-issued Master's and higher degrees. After much confusion and delay, on May 5, 2005, DHS finally published regulations which authorize filing of petitions for these visas. These regulations were effective immediately, but petitions may not be filed (received) until May 12, 2005.

FY2005 H-1B visas available under this provision must be filed with the Vermont Service Center. Electronic filing of ALL H-1B petitions has been suspended until further notice. The regulation provides procedures for upgrading a previously filed or approved FY2006 H-1B (effective 10/1/2005) to a FY2005 H-1B with an earlier start date.

We believe that we have identified all H-1B petitions in our office which could qualify for an upgrade. However, if you or one of your employees has a pending or approved FY2006 H-1B petition that may be eligible for upgrade which we have not discussed with you, please contact us immediately. Due to expected high demand for these visas, we expect that the limit will be reached very quickly, and perhaps as early as May 12 or 13.

Electronic Storage of Forms I-9 is Now Permitted

On October 30, 2004, the President signed into law legislation authorizing employers to retain Forms I-9 in electronic format, and authorizes attestations on the Form I-9 to be manifested by electronic signature. The legislation was to become effective on April 28, 2005, or the effective date of implementing regulations, whichever occurred first. No regulations have been implemented, so the law became effective on April 28, 2005.

Under the law, employers may continue to maintain Form I-9 records in paper, microfilm, or microfiche. They may also maintain records electronically, either in addition to or in lieu of the other methods. U.S. Immigration and Customs Enforcement has offered some preliminary guidance which employers may find helpful until regulations are issued (http://www.ice.gov/graphics/news/factsheets/i-9employment.htm).

The ICE guidance refers employers to Internal Revenue Service standards regarding electronic records, which may be helpful. (IRS Revenue Procedure 97-22)

It may be advisable to wait until DHS issues regulations before implementing a corporate policy on electronic recordkeeping of Forms I-9. If you wish to implement such a policy in the absence of regulations, however, please consult the IRS standards and do not hesitate to contact us for additional information and guidance.

Possible EB-3 Backlog Reduction

As many of you know, there is currently a backlog in the employment-based third preference immigrant visa classification (skilled and professional workers, known as "EB-3") for nationals of India, China and the Philippines. Pending in Congress is legislation which could allow for the recapture of EB-3 (employment-based, third preference) immigrant visas for Schedule A occupations, most notably registered nurses.

Under current law, there is a quota imposed each fiscal year on the number of persons from each country who may immigrate to the U.S. in each immigrant visa classification. At the end of the fiscal year, those numbers which are not used are lost. This legislation would allow for the recapture of unused numbers in the EB-3 visa classification for the last three years, but would limit them to occupations listed in Schedule A of DOL regulations, which are recognized as shortage occupations. Schedule A includes registered nurses and physical therapists. The number of visas which can be recaptured is not to exceed 50,000.

The legislation would also allow recapture of visas in future years, but would not limit them to Schedule A occupations.

This legislation is part of an Emergency Supplemental Appropriations bill (H.R. 1268) which includes funds for military operations, the "War on Terror" and tsunami relief. It has cleared both Houses of Congress and is expected to be signed by the President very soon. We will provide additional information as it becomes available.

Possible New E-3 Visas for Australian Nationals

H.R. 1268 also creates a new visa classification for Australian nationals. The bill will add 10,500 new "E-3" visas for Australians seeking to work in the U.S. in a specialty occupation. The legislation appears to be very similar to the recently created H-1B1 classification for Chilean and Singaporean nationals. We will provide additional information as it becomes available.

REAL ID Act

Also included in H.R. 1268 is the REAL ID Act, which will change significantly the way driver's licenses are issued in the United States. In a purported response to terrorism, the REAL ID Act goes beyond the recommendations of the 9/11 Commission and creates national standards for the issuance of driver's licenses. Applicants for driver's licenses will be required to demonstrate that they are citizens of the U.S. or that they otherwise have lawful immigrant or nonimmigrant status in the U.S., using no less than four forms of identification. State agencies may not accept any foreign document other than a passport to verify identity, effectively rendering issuance of a license impossible for many lawful immigrants.

Nonimmigrants who apply for driver's licenses will only receive such licenses for the period of their authorized stay. State driver's license agencies will be required to verify with the issuing agencies the issuance, validity, and completeness of each document that is required to be presented, effectively turning them into immigration enforcement agencies and potentially causing significant delays in the issuance of licenses.

States which fail to comply with these requirements must print their licenses with unique designs or color backgrounds and clearly state that the licenses may not be accepted by federal agencies to verify identity.

The REAL ID Act also changes existing law in the following additional ways:

- It makes it more difficult to qualify for political asylum in the United States, toughening the evidentiary standards.
- It forecloses most avenues of judicial review for removal orders, particularly those that involve a petition for writ of habeas corpus.
- It expands the definition of "terrorist organization" and "engage in terrorist activity"

Finally, the REAL ID Act allows the Secretary of Homeland Security, in his sole discretion, to waive all legal requirements he deems necessary to expedite construction of security fences and barriers at the borders. This could include worker safety, compensation, zoning, and potentially (in an ironic twist) laws concerning employment of undocumented workers.

For additional information on the REAL ID Act and how it might affect you and your employees, please contact us.

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

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
216-771-5894 (Fax)
immigration@rosnerlaw.com