Immigration Law Update

Current Developments in Employment-Based Immigration

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May 2007

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.

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The "Grand Bargain"

If you read the newspaper, watch TV or listen to the radio, you have probably heard about the comprehensive immigration reform proposal introduced in the Senate, dubbed (without a trace of irony) "The Grand Bargain." The proposal is expected to be offered as a substitute amendment to S.1348.

The main features of this bill are:

a very ambitious legalization effort that would permit a large number of the roughly 12 million undocumented immigrants in the United States to obtain legal status provided they comply with a very demanding set of requirements, introduction of a new temporary guest worker program for non-professional workers, which would be known as "Y"status; and a complete change in the system by which people obtain permanent residence in the United States, moving from a sponsorship-based system to one that hinges on a merit-based point system.

The bill contains other provisions of particular relevance to U.S. employers, which we have summarized below:

F-1 Student Employment: F-1 students may work off-campus in a field unrelated to the student's field of study but only if the student remains a full-time student and the employer has provided documentation to the school that it has recruited for the position and will pay the student the prevailing wage. The bill also allows F-1 students to continue to hold F-1 status if they have applied for an employment-based green card.

H-1B Provisions:

The Good: The bill raises the H-1B cap to 115,000 for FY2008, and up to 180,000 in subsequent years.

The Bad: The bill eliminates experience equivalent to a Bachelor's degree as one of the eligibility criteria for H-1B status, and requires employers petitioning for a 7th or later year H-1B to provide a copy of the employee's Form W-2 with the H-1B.

The Ugly: The bill makes ALL H-1B employers comply with the H-1B dependent provisions concerning attestation regarding layoffs within the 180 days prior to filing, doubles penalties for violations of Department of Labor regulations and requires the DOL and DHS to conduct annual employer compliance audits of at least 1% of H-1B employers.

L-1 Provisions:

The bill makes it harder to extend a "new office" L-1 past the initial 12 month period and to get a new office L in the first place, requires DHS to conduct annual compliance audits of at least 1% of L-1 employers, and adds civil penalties for filing fraudulent L-1 petitions.

Employment-Based Immigration:

The bill eliminates current employment-based immigration categories and puts in their place a new "merit-based" point system with totally inadequate numbers (approximately 40,000 per year while current backlogs are cleared over 5-8 years). The new "point system" would be wildly skewed toward highly educated, English-speaking professionals, with few visas for essential workers or adult children or siblings of citizens. The point system contains no provisions for multinational managers, extraordinary ability aliens, outstanding professors or researchers, or those doing work in the national interest. There would be no labor market test to protect native-born workers.

New I-9 Requirements:

As of the date of enactment, employers in national security-related industries, industries involving critical infrastructure, and federal contractors may be required to electronically verify employees, including new hires and/or current employees, with additional employers or industries added after 6 months. All employers would be required to electronically verify new hires within 18 months of enactment, or on the date on which DHS certifies that the system is operational. Once the system is implemented, all employers would be required to verify all current employees within by 3 years after enactment. Increases penalties significantly over current law for unlawful hiring, employment, and recordkeeping violations.

Lack of Adequate Future Green Cards for Families and Workers:

The future legal immigration program (after 8 years of backlog clearance) provided for in the Senate bill contemplates a legal immigration system composed of 380,000 work visas and 127,000 family-based visas, plus unlimited visas for spouses and minor children of citizens, and some number of refugee visas. According to AILA, economic projections and assessments of family unity needs point to the need for at least 1.8 million visas per year in the future.

Lack of Path to Permanent Status for Future Flow Essential and Highly Skilled Workers:

The new Y temporary worker program would create a constantly churning workforce, as it provides only a two-year nonimmigrant visa and requires that workers leave the U.S. for one year before being eligible to renew their work visa for a subsequent 2-year period. There is no "bridge" to allow essential and highly skilled but non-degreed workers a path to eventual permanent lawful status. There is

a carve-out of 10,000 green cards per year for "essential" Y workers, but it appears they could not seek a permanent visa while in the United States.

Obstacles to Legalization:

The legalization provisions in the Senate bill require currently undocumented workers to register for a temporary work permit, and then, before receiving final lawful permanent status in 8-13 years, travel to their home countries and file applications with a U.S. consulate there. The cost for a single Z visa holder to legalize would be at least $8,500, and could be as high as $11,500. Z holders would not be permitted to sponsor spouses or minor children who are outside the U.S. as of January 2007.

An interesting editorial was published in the New York Times, Sunday, May 20, 2007 The Washington Post provides comprehensive coverage of the immigration debate.

If this bill affects you, please consider contacting your Senators ASAP and as the bill is debated over the coming week.

New Labor Certification Rules Effective July 16, 2007

The U.S. Department of Labor last week published a new regulation, effective July 16, 2007, pertaining to the foreign labor certification program that will have implication on how employers across the country handle foreign labor certifications. There are three main attributes to the rule, which are as follows:

The rule prohibits substitution of beneficiaries on foreign labor certifications;

The rule requires Forms I-140 (Immigrant Petitions for Workers) to be filed within 180 days of the approval of the labor certification; and

The rule requires employers to pay the costs of preparing, filing and obtaining certification (e.g., legal fees and recruitment expenses).

The first main provision prohibits the long-standing practice of many employers, which allowed employers who had filed a labor certification for one employee to substitute another employee if the first employee left the company, without redoing the labor certification process.

The second requires employers to file an immigrant petition within 180 days of approval of a labor certification, or the labor certification becomes invalid. For labor certifications approved prior to July 16, 2007, immigrant petitions must be filed within 180 days after July 16.

The final provision requires employers to bear the costs associated with the labor certification process. The rule is a bit unclear about exactly what these costs entail, but we believe that "costs" refers to all costs associated with the application, including legal fees and recruitment expenses. The rule does allow employees to hire their own attorneys to assist them in the process, but such attorneys are inherently limited to an advisory role. Similar to the restrictions on the H-1B "training fee," employers may not recoup labor certification costs from employees in any way.

As we delve deeper into this complicated new rule, we will advise you further. Please also contact any attorney at Rosner and Associates to ask how this new rule specifically affects you or your employees.

Fee increase to be Finalized Soon

We have recently learned that the fee increase which was proposed in January is at the Office of Management and Budget for final review, and is to be published "soon." We do not yet know how much the final rule resembles the proposed rule, but we do expect to see substantial fee increases in employment-based and other types of applications for immigration benefits. We will advise you as soon as we have additional information.

You may obtain a copy of press releases and fact sheets at www.uscis.gov/pressroom, under "January, 2007." The text of the proposed rule is available at http://www.regulations.gov/fdmspublic/component/main (search for Document ID USCIS-2006-0044-0001 in the "Keyword or ID" field). ticipate in training programs under the J-1 visa, these regulations would:

1. Eliminate training for individuals in the first three years of their careers;
2. Establish cost prohibitive operational procedures not required of any other visa category;
3. Increase the potential for fraud and abuse, by forcing many sponsors to have to contract with overseas agents for the recruiting and interviewing of candidates; and
4. Eliminate training at virtually every social service agency in the country.

Many of our clients have used the J-1 program to bring foreign students and recent graduates to the U.S. as interns. Many of these individuals are associated with foreign affiliates of the companies in the U.S., and use the J-1 program to obtain training which gives them a good starting point in a fruitful career with the foreign affiliate. The proposed J-1 regulations would eliminate this kind of training. If you are interested in learning more, please click here for the text of the regulations, and contact us for a sample comment to the regulations. Comments are due by June 6, 2006.

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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