Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner & Associates. L.L.C.

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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.

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H-1B CAP – We're Nearly There

As you may know, a limit exists on new H-1Bs for each fiscal year. That limit for FY2007, which begins October 1, 2006, is 58,200, plus an additional 20,000 for individuals who have earned a master's degree or higher in the United States. As of May 23, 45,150 H-1Bs for individuals without US Master's degrees were approved or pending at CIS. 5,555 Master's degree cases have been approved or are still pending. This means that although there appear to be plenty of H-1Bs left for individuals with U.S. graduate degrees, we are very, very close to the H-1B cap for 2007 for everybody else. If you have any employees who are subject to the H-1B cap and who will need an H-1B before October 1, 2007, please contact us immediately. If you'd like to track the H-1B cap numbers, you can do so at http://www.uscis.gov/graphics/services/tempbenefits/cap.htm.

UPDATE: H-1B CAP REACHED

May 26, 2006, we reported to you that we were about to reach the H-1B cap for FY2007. We didn't realize exactly how close we were – CIS announced June 1, 2006 that the H-1B cap was reached on May 26. If you have any questions about how the H-1B cap may affect your employees, please contact us. The CIS Press Release on the H-1B cap may be viewed at http://www.uscis.gov/graphics/publicaffairs/newsrels/FY-07H1BCap_060106PR.pdf.

As of this writing, CIS has indicated that nearly 15,000 H-1Bs are left under the U.S. advanced degree exemption. However, given that many postgraduate students have recently graduated and are currently accepting offers of employment, it is not unreasonable to assume that we may reach this cap fairly soon as well. If you need to file an H-1B for an employee who possesses a Master's degree or higher from a U.S. university, please contact us as soon as possible.

As we mentioned in our newsletter last week, the Senate's Comprehensive Immigration Reform bill does contain an increase in the H-1B cap. The House version of the bill, however, does not, and it remains to be seen whether a cap increase will find its way into the final legislation. If this matter is at all important to you, we urge you to contact your Congressional representatives to encourage them to pass an increase in the H-1B cap. It is very easy to do so at http://capwiz.com/aila2/issues/alert/?alertid=5183421&type=CO.

Again, if you have any questions, please feel free to contact anyone at Rosner and Associates.

Premium Processing Program to Expand

On May 23, 2006, USCIS announced that three additional applications will soon be eligible for premium processing: Forms I-140 (Immigrant Petition for Alien Worker) (except for national interest waivers), I-539 (Application to Extend/Change Nonimmigrant Status), and I-765 (Application for Employment Authorization). Under the premium processing program, an applicant or his or her employer can pay an additional $1000 fee to adjudicate an application within 15 days. USCIS also announced that it will notify the public of the dates that premium processing becomes available for these three applications on its website, uscis.gov. We will notify our clients when premium processing does become available for Forms I-140, I-539 and I-765.

Comprehensive Immigration Reform

One cannot turn on the TV, radio, or open a newspaper these days without hearing about the ongoing immigration debate. Congress is currently considering legislation which could, if passed, significantly change U.S. immigration law in a number of ways. As you have probably heard, the Senate passed its version of the bill on Thursday. The American Immigration Lawyers Association has provided this summary of the provisions of the bill which may be of interest to employers:

Employment Visa Backlog Relief

- New employment-based cap of 450,000 for a 10-year period, adding 310,000 new visas per year; spouses and children of certain employment-based immigrants capped at 650,000, others may remain outside the cap
- 30% of employment-based cap reserved for "essential" workers
- Provisions for widows, orphans, and lower threshold for affidavits of support

High-Skilled Immigration Reforms

- Reform of student visa rules to authorize dual intent, expand the period of OPT, and create a direct path to permanent

status for certain advanced degree students

- Increase in H-1B cap to 115,000 with market-based escalator and exemption for STEM (science, technology, engineering or math) advanced degree holders
- Exemptions for the annual employment-based cap for STEM advanced degree holders, aliens of extraordinary ability, and outstanding professors and researcher

New Temporary Worker Program with Labor Protections and Path to Permanent Status

- New program for 200,000 new temporary "essential" workers per year
- 3 year visa, renewal for 3 years, with portability to work for employer of choice
- Current undocumented who entered U.S. after January 2004 are eligible, must leave country to apply, 3/10 year bars are waived
- Employer has to seek U.S. worker first; labor protections and market wage requirements
- Can apply for permanent status ("green card"), within the new employment-based cap; can self-petition if worked for 4 years, otherwise employer can petition

Path to Legal Status for Undocumented Currently in the United States

Undocumented in U.S. for at least 5 years prior to April 5, 2006 (estimated 6.7 million) eligible for 6 years of work authorization and path to eventual permanent legal status, upon payment of $2,000 fine, meeting English and civics requirement, passing background checks and paying taxes owed.

- Will get LPR status ("green card") after current family backlogs are cleared
- After 5 years as LPR, can apply for citizenship.
- Undocumented in U.S. less than 5 but more than 2 years, (estimated 2.8 million) "Deferred Mandatory Departure (DMD) status, providing work authorization and eventual path to permanent status with following requirements:
- Must leave country within 3 years, "touch base" and return
- Can apply for readmission before departure
- Departure requirement waived for spouses/children, or if substantial hardship on person or immediate family.

The Senate bill does contain a number of other less friendly provisions, including enforcement and border security measures. The bill now goes to the House of Representatives, where it must be reconciled with a bill the House passed last year. As that bill provides only border security and enforcement measures, and the Senate bill faces stiff opposition in the House, the reconciliation process is likely to be arduous, to say the least. Additional information on the two bills is available at http://www.aila.org/content/default.aspx?docid=19508 and at http://www.npr.org/templates/story/story.php?storyId=5430857.

The conference committee which will take up the two bills is expected to meet in June. We will keep you posted as this process moves forward.

Changes in J-1 Regulations

Last month, the Department of State proposed changes to its Exchange Visitor (J-1) Training and Internship Programs. These regulations, if finalized, would prohibit university students from around the world from coming to the U.S. for internships. Approximately 27,000 professional trainees and interns come to the U.S. annually under the auspices of the Exchange Visitor Program. The Exchange Visitor Program, a series of exchanges regulated by the Department of State but in most cases not federally funded, brings a total of 275,000 people to the U.S. annually to participate in high school, university student and scholar, summer work, camp counselor, and au pair exchanges, among other categories. In addition to banning approximately 15,000 international students who currently participate 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.

What to do in the Event of an I-9 Raid or Audit

Recently, Immigration and Customs Enforcement ("ICE") has been stepping up enforcement, paying visits (announced and unannounced) to manufacturing plants and other employer sites around the country. The purpose of these investigations is to determine employer compliance with respect to employment eligibility. The civil prohibitions on employment eligibility are:

1. hiring an employee after November 6, 1986 and failing to complete the Employment Eligibility Verification Form (Form I-9); and
2. knowingly hiring or continuing to employ an unauthorized alien after November 6, 1986.

These investigations may also result in arrests of immigrant employees and, in some cases, their U.S. citizen supervisors and managers. In addition to the loss of workforce, these companies face civil and criminal penalties and fines.

It is important to know your rights in the event ICE comes knocking on your company's door. Generally, ICE will issue a subpoena requesting the I-9 records and payroll records for a company. Sometimes it will send a letter, granting a specific time period in which these records must be provided. In such cases, we strongly advise that the employer should immediately contact our office and provide a copy of the subpoena or letter. We will advise your company on how to proceed with the audit.

The Immigration and Nationality Act ("INA") grants the authority to interrogate and/or arrest any alien reasonably believed

to be in violation of U.S. immigration laws. However, the Fourth Amendment of the Constitution limits this right and protects the right of the people from unreasonable searches and seizures. Generally, a warrant is needed to search an employer's premises. However, if consent is voluntarily given, no warrant is needed. Therefore, if ICE makes a surprise visit to your company, special care must be taken to protect your rights. No company employee should make any statements to the ICE agents. If a warrant is presented, it should be faxed to our office immediately for review, before any records are turned over.

Of course, the best way for a company to protect itself is by remaining in compliance with the Immigration Reform and Control Act of 1986, through which the I-9 program is authorized. Make sure I-9 records are completed in a timely manner (within three days of the date of hire), and are done completely and correctly. Having properly completed I-9 records for each and every employee will provide your company with a "good faith" defense against any charges of noncompliance.

Companies should conduct periodic self-audits of their I-9 records, identifying problem areas and providing training to Human Resources staff. Corrections may be made to existing I-9 records, provided they are initialed and dated with the date of the correction. A separate I-9 compliance folder should be maintained, documenting all activities related to I-9 compliance. In this way, a company may demonstrate a good faith effort in compliance, even in cases where I-9 records are incomplete.

In summary, ICE has made I-9 enforcement a growing priority. Fines and penalties have increased, and arrests are no longer limited to aliens found to be illegal. By properly completing an I-9 record for each and every employee hired after November 6, 1986, as required by law, you can protect yourself and your company from employer sanctions violations. Please contact us if you require any additional information, or would like to discuss how to conduct a self-audit of your I-9 records.On April 1, 2006 USCIS will begin to accept H-1B petitions requesting an October 1 start date. Employers anticipating new hires who will need H-1B status should plan to file petitions on behalf of these individuals as soon as possible. Employers should pay special attention to employees who hold EADs, as these individuals will need H-1B status to continue their employment beyond the expiration of their EAD. In some cases, employers need to be prepared for the possibility that there will be a gap between the validity of the EAD and the H-1B start date.

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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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