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.

Major Labor Certification Changes on the Horizon: Perm is (Almost) Here!!

The oft-mentioned, long-awaited change to the labor certification process, known as PERM, is almost here. The rule cleared the Office of Management and Budget on December 10, and should be published this week. The rule is expected to become effective 60 days after publication. We will study the rule upon its publication, and will report on the new program in early January. In the meantime, if you have any questions about what PERM might mean for a particular case, please contact us.

Changes to H & L VISA Classifications

In our last newsletter, we advised you of proposed changes to the H and L visa classifications which were included in the Fiscal Year 2005 Omnibus Appropriations bill. On December 8, 2004, President Bush signed the bill into law. As expected, the subtitles relating to H and L visas significantly alter these classifications. Both subtitles include heightened record-keeping requirements, filing fee increases and substantive changes to governing law. The changes enumerated in this newsletter are not identical to those described in our November newsletter, and represent the final provisions of the H and L subtitles, as enacted. Unless otherwise indicated below, changes to the L visa classification will be effective on June 8, 2005, and changes to the H visa classification will be effective on March 8, 2005.

Changes to the L Visa Classification

The Omnibus Appropriations Act contains the L-1 Reform Act of 2004, which makes three principal changes to the L visa classification. These changes include an increase in filing fees, a change in the length of qualifying employment, and a change to the employment requirements for L-1B workers in the United States.

First, the Act implements a $500 fraud fee for all H-1B and L-1 temporary workers, which will come into effect on March 8, 2005. This fee, which is to be used for enforcement and antifraud efforts, is in addition to the $185 filing fee required to submit Form I-129, Petition for Nonimmigrant Worker. The fee only applies to initial petitions and petitions filed by new employers, as opposed to petitions to extend or amend stay. The fee also applies to Blanket L-1 petitions filed directly at U.S. consular posts abroad. Fees for Blanket L-1 petitions filed after March 8, 2005 must include the new $500 fee, plus the Machine Readable Visa fee (currently $100), as well as any other country-specific ("reciprocity") fees which may be required.

Second, the Act amends INA §214(c)(2)(A) by requiring that all L-1 applicants, including Blanket L applicants, have worked for the qualifying company abroad for a period of at least one year. This provision reverses previous changes to the law enabling applicants with as little as six months of qualifying employment with companies with a Blanket L approval to apply for L-1 visas at consulates abroad. Please note that this provision does not alter the eligibility of existing Blanket L beneficiaries to apply for an extension of stay, even if they did not work for the qualifying company abroad for at least a year.

Finally, the L-1 Reform Act limits L-1B employment in the United States to include only employment where the beneficiary works directly for the petitioning employer. Situations where the L-1B employee is employed at a worksite other than that of the petitioning employer are not permitted unless the beneficiary's work remains controlled and supervised by the petitioning employer and the offsite arrangement is related to the specialized knowledge of the petitioning employer, rather than an arrangement that essentially provides labor for hire. We expect that any off-site employment of L-1B workers will be very closely scrutinized, and employers will be required to explain in detail why such off-site work falls within the standards enumerated in the statute.

Changes to the H Visa Classification

The H subtitle of the Omnibus Appropriations Act, known as the H-1B Reform Act of 2004, enacts several changes to the H-1 visa classification. The most significant changes relate to filing fee increases, prevailing wage and the H-1B cap.

First, the Act reincarnates the fee imposed by the American Competitiveness and Workforce Improvement Act (ACWIA), which sunset on October 1, 2003. The Act raises this fee to $1500 for employers with more than 25 employees, and lowers it to $750 for employers with 25 or fewer employees. This fee was effective for H-1B petitions filed on or after December 9, 2004. The exceptions to this fee contained in ACWIA – certain nonprofits, schools, etc. - remain in place. In addition to this fee, employers filing new H-1B petitions will be required to pay the $500 fraud fee discussed in the L visa section above. The $500 fee is effective for petitions filed on or after March 8, 2005.

In short, after March 8, 2005 most employers with more than 25 employees can expect to pay $2,185 in filing fees to procure an H-1B visa for most new H-1B petitions and $685 to extend the status of

prospective employees holding H-1B status with another company. Most employers with 25 or fewer employees can expect to pay $1,435 in filing fees for most initial H-1B visa applications and $685 to extend or amend the status of prospective employees holding H-1B status with another company. Applications to premium process H-1B petitions will continue to require payment of an additional $1,000 fee.

In addition to the changes to the filing fees, the new law makes changes to the prevailing wage requirements for both H-1B petitions and labor certification applications. Effective March 8, 2005, employers will no longer be permitted to offer 95% of the prevailing wage in order to satisfy wage requirements for the Labor Condition Application, certification of which is necessary to submit the H-1B petition. Under the new provision, employers will be required to pay 100% of either the prevailing wage or the actual wage of employees in the same position, whichever is higher. To mitigate this heightened standard, government surveys will be required to provide four levels of wages commensurate with experience, education and level of supervision. The section provides a formula for calculating intermediate wage requirements where a two-level survey is used.

Finally, the new law raises the H-1B visa cap by an additional 20,000, reserved for foreign workers with Masters' degrees or higher from U.S. educational institutions. It remains to be seen precisely how this will affect allocation of visas for beneficiaries who do not possess a Master's degree. This provision is not effective until March 8, 2005. USCIS has not yet provided instructions for filing these petitions, beyond saying that it is expected that all petitions, at least in the short-term, will be filed with the Vermont Service Center regardless of the location of the employment.

EB-3 Backlog Effective January 1, 2005

The State Department has announced a retrogression of the third employment-based ("EB-3") immigrant visa classification for nationals of India, China (mainland-born), and the Philippines. The retrogression to January 1, 2002 is effective as of January 1, 2005. We have not experienced a backlog in any employment-based visa classification since April 2001.

EB-3 classification includes individuals who are immigrating to the U.S. based on a job requiring a Bachelor's degree or a lesser level of education and/or training. The retrogression means that unless the individual has filed a labor certification (or in the case of nurses, an immigrant petition) prior to January 1, 2002, they are not eligible to adjust status or obtain an immigrant visa abroad at this time. The date of filing is known as the "priority date." Until their priority date is current, meaning that the State Department is issuing visas for applications filed on or after the date their application or petition was filed, they may not adjust status or apply for an immigrant visa abroad.

Individuals subject to this backlog with pending adjustment applications may continue to receive employment authorization and advance parole, and their adjustment applications will remain pending until their priority date is reached. Individuals in the United States in H-1B status who have filed labor certification applications and/or immigrant petitions, but who have not filed adjustment applications prior to January 1, 2005, may extend their H-1B status until they are eligible to file for adjustment. Individuals who are outside the U.S. and who are waiting for immigrant visas are, unfortunately, in for a long wait.

If you believe that you or one of your employees may be subject to this backlog, please contact us for additional information.

President Signs Intelligence Bill

On December 17, the President signed an intelligence reform bill that will reorganize American intelligence agencies and introduce measures specifically targeted at terrorist infiltration of the United States. The law includes several provisions that will affect foreign nationals living in the United States, as well as those seeking entry into the country.

In addition to increased reporting requirements, the legislation includes provisions authorizing the introduction of pilot programs targeted at increasing border security and increased manpower for Immigration and Customs Enforcement.

The law authorizes the creation of two pilot programs: one to test advanced technologies for improving border security between ports of entry along the country's border with Canada and the other to monitor illegal activity along the country's border with Mexico.

A Border and Immigration Enforcement subtitle calls for an increase in border patrol agents by not less than 2,000. At least 20% of the agents appointed under this section must be assigned to the northern border. This section also mandates that Immigration Customs personnel be increased by at least 800 investigators each year between FY 2006 - 2010.

Another provision of the law requires that, absent a waiver, applicants for nonimmigrant visas between the ages of 14 and 79 participate in an in-person consular interview, a requirement which was implemented in most consulates in the aftermath of the events of September 11, 2001.

The law increases anti-smuggling penalties and renders removable any alien who has received training from or on behalf of an

organization that, at the time of training, was a designated terrorist organization. A list of organizations designated as terrorist organizations can be found at the Department of State website, http://travel.state.gov.

The law also renders removable any alien whose visa has been revoked. The validity of the visa revocation would be reviewable in a removal proceeding in which the revocation constitutes the sole ground for removal.

The law passed without the inclusion of earlier provisions that would have barred states from issuing driver's licenses to illegal immigrants and limited appeals for immigrants facing deportation. Chairman of the House Judiciary Committee, Republican James Sensenbrenner, has indicated that he will reintroduce these provisions when the new Congress convenes on January 4th.

Employment Verifications Pilot Program Expanded

On December 20, USCIS announced that it is expanding its employment verification pilot program, known as the Service and Systematic Alien Verification for Entitlements (SAVE) Program, to all 50 states and the District of Columbia. Under this program, employers may obtain automated confirmation of a newly hired employee's employment eligibility after completion of Form I-9. Previously, the program was only available in six states, and confirmation was accomplished by phone. Under the expanded program, employers may register and obtain confirmations online via the Internet.

For additional information, please telephone the SAVE Program at 888-464-4218, or visit their website at https://www.vis-dhs.com/employerregistration/.

Happy Holidays to you and yours from all of us at Rosner & Associates.

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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