Immigration Law Update

Current Developments in Employment-Based Immigration

By Rosner and Associates Co. L.P.A.

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.

November 2000

SIGNIFICANT CHANGES MADE TO IMMIGRATION LAWS

Raised H-1B Cap and Increased Portability

On October 17, 2000, President Clinton signed legislation which increases the number of H-1B visas available each fiscal year, and appears to alleviate many of the problems which have been caused by excessive INS processing delays. Some key provisions of The American Competitiveness in the Twenty-First Century Act of 2000 ("AC21") include:

- Increase of H-1B cap to 195,000 for FY2001, 2002, and 2003.
- All H-1B petitions filed after the FY2000 cap was reached, but prior to September 1, 2000, are to be counted against the FY2000 cap, which is to be raised to equal the number of cases filed.
- Exemptions from the H-1B cap include individuals employed by higher educational institutions and their related or affiliated nonprofit entities, individuals employed by nonprofit research or government research organizations, and certain J-1 physicians applying for a change of status to H-1B.
- Prohibits INS from counting toward the cap any H-1B nonimmigrant who has held H-1B status within the previous six years, unless they are eligible for a new 6 year period of stay.
- H-1B Portability Provision - Allows H-1B nonimmigrants to change jobs upon the filing of an H-1B petition by a new employer.
- Job Mobility Provision - Allows individuals who have filed for adjustment of status (a "green card"), and whose cases have been pending for at least 180 days, to change jobs or employers without affecting the validity of the underlying I-140 (immigrant petition) or labor certification, as long as the new job is in the same or similar occupational classification as the original job.
- Provides that H-1B nonimmigrants for whom an I-140 has been filed, and the labor certification or I-140 was filed at least 365 days prior to the expiration of six years in H-1B status, may obtain extensions of H-1B status beyond the six year maximum, in one year increments, until adjudication of the adjustment of status application.
- Allows an individual who has an I-140 pending or approved, and who would be eligible to file for adjustment but for the per-country limits on immigrant visas, to extend nonimmigrant status until the adjustment of status application is decided.

Although AC21 seems to provide significant benefits to nonimmigrant workers and their employers, there are a number of implementation issues that INS has yet to address. First, the H-1B portability provision could have serious consequences for the worker if the new H-1B petition is ultimately denied. Although this rarely happens, in the absence of INS guidance on the issue it is advisable that both the employer and the worker consider this possibility very carefully before taking advantage of the portability provision.

Second, the job mobility provision also raises a number of significant issues. As the statutory provision does not provide an effective date, the INS has reportedly taken the position that the provision only applies to I-485s filed after October 17, 2000. Individuals with I-485s filed prior to that date who leave employment in reliance on this provision could find their applications denied if INS sticks with its initial interpretation.

$1000 Filing Fee

Also on October 17, the President signed a bill which raises the H-1B filing fee from $500 to $1000, effective December 17, 2000. All petitions received by the INS on or after December 17 must include the new fee.

Mergers and Acquisitions

The Visa Waiver Permanent Program Act, discussed below, includes a provision which makes changes to the requirements for amending H-1B petitions. The provision states that amended H-1B petitions are not required in the event the petitioner is involved in a corporate restructuring, such as a merger or acquisition, if no other changes to the H-1B worker's position are involved. Unfortunately, until the Department of Labor changes its regulation, a new Labor Condition Application is still required if the petitioner changes its federal tax id number.

Visa Waiver Program Made Permanent

On April 30, 2000, the Visa Waiver Pilot Program expired. The program, which allows the INS to admit travelers from certain countries to the U.S. for up to 90 days without a visa stamp, has been a "pilot," or temporary program since its inception in 1986. Since April 30, travelers have been "paroled" into the United States, under the same 90 day terms.

On October 30, 2000, the Visa Waiver Pilot Program was made permanent. The following countries currently participate in the program: Andorra, Argentina, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and Uruguay.

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H-1B CAP ON THE HORIZON

New Legislation May Provide Relief

As many of you already know from your work with us, the number of H-1Bs issued in FY2000 is fast approaching the visa cap. INS recently issued a statement saying that it would publish a notice in the Federal Register when the number of pending H-1Bs, plus those already issued, would reach the cap within 30 days. Within two days, INS retracted that statement, indicating that it would not give the 30-day warning. This has led to speculation that the cap will be reached by mid-March, if not sooner. INS has not yet indicated how it expects to handle cases which are caught by the cap.

A bill to raise the cap was introduced in the U.S. Senate on February 9, 2000. S. 2045 would raise the cap by 80,000 in FY 2000, 87,500 in FY 2001, and 130,000 in FY 2002. The bill would also exempt from the cap all H-1B workers who are employed by institutions of higher education, nonprofit or governmental research organizations, and all workers who file the petition within the period 90 days before or 180 days after receiving a master's degree from a U.S. university. The bill would also allow H-1B workers to transfer from one employer to another without first receiving an approved amended H-1B petition.

On March 1, Congressman Lamar Smith introduced a House bill which would raise the FY2000 cap by 45,000, provided the Department of Labor meets certain conditions. The bill, which has not yet been assigned a bill number, also imposes a number of unfair burdens on employers. For example, the bill will require the State Department to verify all foreign degrees, require H-1B aliens to work full-time, require petitioning employer to have gross assets of at least $5 million, and raises fees for H-1Bs from $610 to at least $1,210.

For additional information, please contact Marin Ritter at Rosner and Associates.

Other H-1B News

On February 29, 2000, INS issued final regulations concerning the $500 filing fee required by the American Competitiveness and Workforce Improvement Act of 1988 (ACWIA). The regulations, which become effective March 30, also require the filing of a new form, I-129W, with all H-1B petitions. The form is designed to gather data that Congress requires as part of the ACWIA, and is used to request an exemption of the $500 filing fee for certain nonprofit entities. If you would like to obtain a copy of the regulations and/or Form I-129W, please contact Rosner and Associates.

INS Processing Delays Continue

Although H-1B processing is likely to speed up due to recent INS approval of overtime for H-1B adjudicators, processing of other types of applications has slowed considerably. Employment-based immigrant visa petitions, particularly in Nebraska, have slowed to a crawl. Current receipts show processing times of 408 to 438 days, and second preference (national interest waivers) petitions are reportedly not being processed at all. There is no indication that this sorry state of affairs will change at any time in the near future.

What's This We Hear About Amnesty??

In a dramatic about-face, the AFL-CIO recently announced that it now supports granting amnesty to certain illegal immigrants and repealing the Form I-9 requirements implemented in 1986. The AFL-CIO was one of the prominent supporters of the I-9 requirements, with which all U.S. employers must comply to verify the employment eligibility of new hires. No legislation has been introduced to implement these changes, and it is unlikely that any such legislation will be passed this year. For additional information on the AFL-CIO policy, please see the organization's website at www.aflcio.org.

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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