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.

November 2003

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.

U.S. ICE Raids Wal-Mart

On October 23, US Immigration and Customs Enforcement arrested 250 undocumented workers in what is the first large-scale immigration raid in several years. Commentators have noted that, since September 11, the enforcement arm of the Department of Homeland Security has primarily focused on border protection, implementing an intense campaign to prevent terrorists from infiltrating the United States at ports of entry nationwide. The Wal-Mart raid, with its far reaching impact on 21 states and over 60 stores, marks the first comprehensive effort of the Department of Homeland Security to tackle employer violations of U.S. immigration law since 9/11.

Wal-Mart, which denies it was part of any "scheme involving illegal workers," did not directly employ the majority of the undocumented workers arrested in the recent raid. The Company sub-contracted cleaning services, and claims that the third-party contractors were entrusted to hire only workers who are authorized to accept employment in the United States. However, federal officials have indicated that they believe Wal-Mart knew about the widespread use of undocumented workers in their stores. On October 31, Wal-Mart received a "target-letter" from a federal grand jury in Pennsylvania.

Under existing immigration law, employers are under no duty to verify the background of third-party contracted workers where the employer does not set work hours or provide necessary tools to do the job, and where the employer does not have the authority to hire and fire. Although experts are undecided whether the Wal-Mart raid marks a return to the more stringent employment enforcement that marked the late '80s and early '90s, the decision of U.S. Immigration and Customs Enforcement to pursue Wal-Mart's involvement in the employment of undocumented workers despite the use of third-party subcontractors suggests that the government has little tolerance for companies it believes are hiding behind independent contractors to evade immigration laws.

In a related matter, lawsuits have been filed against Wal-Mart by a number of the illegal employees, charging, among other things, that Wal-Mart failed to pay them overtime and discriminated against them on the basis of national origin.

There are lessons to be learned from the unfolding case against Wal-Mart: if your business uses contractors, you may not be as immune from immigration-related and other employment law violations as you might believe, even if you require that your contractors hire only legal workers. We suggest that clients who do use contractors reevaluate their current practices to ensure that inadvertent violations of immigration and employment laws are not occurring. For additional information, please contact Rosner & Associates or your employment law counsel.

I-9 Issues

In the wake of Wal-Mart, it is not unrealistic for employers to expect increased scrutiny of their employment practices and audits of their I-9 records by US Immigration and Customs Enforcement and the Department of Labor.

The I-9 record, which establishes an employee's identity and employment eligibility in the United States, must be maintained for every employee hired after November 6, 1986, subject to certain rehiring exceptions. Despite the deceptively simple appearance of the form, I-9 compliance is a very complicated area that is misunderstood to varying degrees by many employers. Failure to properly complete and maintain I-9 records for every applicable employee can result in substantial paperwork fines and penalties for the employer, even where no unauthorized or illegal employment is found. Therefore, we strongly urge our clients to establish and adhere to a system for complying with the I-9 requirements on an ongoing basis.

If you would like assistance in conducting an internal I-9 audit, or advice on establishing an I-9 system, please contact Rosner & Associates.

NSEERS' One-Year Anniversary

November 15 marked the one-year anniversary of the commencement of Special Call-In Registration for male foreign nationals over the age of 16 from Iran, Iraq, Libya, Sudan and Syria. The Registration requirement, which came to encompass foreign males from twenty-five countries, experienced its initial deadline on April 25, 2003, however, Special Registration did not end on that date.

Special Registration imposes ongoing requirements, which apply both to those who complied with the Call-In requirement and those who were admitted to the U.S. as a nonimmigrant at any time on or after September 11, 2002. Individuals who registered as part of NSEERS Special Call-In Registration must re-register in person every year at an immigration office within 10 days of the Anniversary of their initial registration date. Individuals who registered at a port of entry must report to a designated government immigration office within 30 to 40 days of the date of admission to the United States.

Last weekend, however, USCIS indicated that the NSEERS program may soon be eliminated in view of the implementation of US-VISIT (see below). It remains to be seen which requirements, if any, will exist, but in the meantime, all foreign nationals who are subject to NSEERS must continue to comply with existing requirements.

Failure to comply with current requirements may result in serious penalties, including deportation from the United States. For more information, please visit the American Civil Liberties Union website at www.aclu.org, or contact Rosner & Associates.

National Benefits Center to Process All Family-Based Cases

U.S. Citizenship and Immigration Services (USCIS) has commenced a new program by which all family-based petitions and applications that are filed at certain local offices will be forwarded to the National Benefits Center ("NBC") in Missouri for intake, initial processing, and issuance of Employment Authorization and Advance Parole documents.

This program is currently being implemented by several District Offices, as well as their sub-offices and satellites. Those offices which have not yet implemented the program are expected to do so within the next several months. Applications that were filed with District Offices that have implemented the program have been transferred to Missouri. To date, the following District Offices, as well as their sub-offices and satellites, have implemented the program: Atlanta, Chicago, Denver, Harlingen, Honolulu, Houston, Miami, New York, Phoenix, and St. Paul. Eventually, all family-based cases will be filed directly with the NBC.

Although the National Benefits Center is seen by USCIS as representing the first step in standardizing family based immigration on a national level, the Services' data systems do not yet support a central biometric database that can be used to streamline fingerprint requests and background checks. We will keep you apprised of developments in this area.

US-VISIT: Biometric Data to be Taken at all Ports of Entry

On October 28, the Department of Homeland Security unveiled the United States Visitor and Immigrant Status Indicator Technology program (US-VISIT). The program will implement scanning procedures to collect biometric data at ports of entry into the United States. US-VISIT will supplement the information traditionally available to immigration officers at ports of entry with identifying data, making it much harder for immigration violators to exit and enter the United States without notice.

US-VISIT marks one of a series of strategies implemented by the Department of Homeland Security to heighten security by providing a standardized record of visitors entering and leaving the United States. The program will affect all visitors to the United States requiring a visa. For those who enter on the visa waiver program, biometric data on machine readable passports will be required after October 26, 2004. As the program currently exists, Canadian citizens are the only foreign nationals who may be exempt from biometric requirements.

Congress has mandated that US-VISIT be operational at all air and seaports by December 31, 2003. The 50 most highly trafficked land ports of entry must be operational by December 31, 2004, and by December 31, 2005, all ports of entry must employ the US-VISIT program.

Fast Track Trade Acts and Their Effect on the Availability of H-1B Visas

As you'll remember from our last newsletter, the number of H-1B visas issued for the current fiscal year reverted to 65,000 on October 1, 2003. This H-1B "cap" applies to all H-1B visa applicants except those applying for extensions of stay in H-1B visa status and employees of higher education institutions, nonprofit research organizations and government research organizations.

It is generally agreed by immigration law practitioners that the current H-1B cap will fail to meet the need for H-1B visas in FY2004. For the first three quarters of FY2003, USCIS approved 56,986 H-1Bs which were subject to the cap, and estimated that it would approve an additional 16,000 H-1Bs subject to the cap in the fourth quarter. FY2004 is hampered by two factors that will further limit the availability of H-1B visas. First, the cap must stretch to meet the needs of applications pending since FY2003. Second, "fast track" trade initiatives currently being pushed by the Bush administration will further reduce the number of visas available for H-1B visa applicants subject to the cap.

The first countries to enter into Trade Agreements with the United States under the "fast track" initiative are Chile and Singapore. The United States-Chile Free Trade Agreement Implementation Act and the United States-Singapore Free Trade Agreement Implementation Act both include provisions creating a new H-1B1 nonimmigrant classification for Chilean and Singaporean nationals temporarily entering the United States to perform services in specialty occupations. The Acts allocate 1,400 H-1B1 visa slots to Chileans and 5,400 to Singaporeans, although slots that are not utilized by the end of the fiscal year will revert to general availability.

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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Changes for FY2004

September 30, 2003 marks the end of the fiscal year for U.S. Citizenship and Immigration Services and the Department of State. The start of fiscal year 2004 will introduce important changes in immigration procedure and policy, affecting foreign nationals and their employers nationwide.

Two issues in particular are likely to command attention from our corporate and professional clients. The first is the upcoming sunset on important H-1B provisions, and the second the possible waiver of the October 1, 2003 deadline for machine-readable passports.

Sunset of H-1B Provisions

September 30, 2003 marks the sunset of several important H-1B visa provisions. First, and ultimately of most concern to immigration advocates, is the dramatic decrease in the cap on H-1B visa petitions that can be approved in a fiscal year. Enacted on October 17, 2000, the American Competitiveness and Workforce Improvement Act (ACWIA) temporarily increased the cap of H-1B visas to 195,000; however, this provision remains in effect only until the end of fiscal year 2003. In the absence of legislation to raise the cap, the limit decreases to only 65,000 H-1B visas for fiscal year 2004. Given the state of the U.S. economy, the country has seen a decreased need for H-1B visas in the past two years. It remains to be seen whether 65,000 H-1B visas will be enough to satisfy that need in 2004.

Also sunsetting on October 1 is the $1,000 "training fee." The $1,000 H-1B filing fee was introduced with the enactment of The American Competitiveness in the Twenty-First Century Act (AC21). Like the increase in the H-1B visa cap, the filing fee increase was a temporary measure, to run only through September 30, 2003. Unless addressed by Congress, the $1,000 H-1B filing fee will no longer be required after October 1, leaving only the $130 fee for applicants who do not elect to pursue Premium Processing.

The end of fiscal year 2003 will also see the sunset of dependent attestations and the ability of the Labor Department to initiate an investigation without a complaint from an aggrieved party.

There is legislation currently pending which would make the $1000 filing fee permanent and make other changes to the H-1B and L-1 nonimmigrant classifications (this bill was discussed in our August newsletter). It is extremely unlikely that this legislation will be passed and signed into law prior to October 1. For more information on the changing H-1B requirements, please contact Rosner & Associates.

Potential Waiver of the Machine Readable Passport Deadline

As you may remember from the August issue of our newsletter, the Department of State has announced that all nonimmigrants seeking to enter the United States pursuant to the Visa Waiver Program will be required to possess a machine-readable passport as of October 1, 2003. This new requirement impacts business visitors and tourists from 27 participating countries. This change includes all categories of passports (tourist, diplomatic and official) and requires that each person seeking entry to the U.S., including infants, have his or her own passport. The Department of State has cautioned that, subsequent to October 1, nonimmigrants without a machine-readable passport will require visas to enter the United States.

In a recent cable, the Department of State indicated that it is prepared to extend the deadline from October 1, 2003 to October 26, 2004, contingent on certain attestations from 26 of the visa waiver countries. The proposed extension will not apply to Belgium, which has been required to present machine-readable passports since May 15, 2003. The other 26 countries that participate in the Visa Waiver Program have been asked to address a diplomatic note to the Department of State, indicating their commitment to make machine readable passports generally available to their citizens, as well as their commitment to mitigate the misuse of non-machine readable passports. Waivers of the October 1, 2003 deadline will not be extended past October 26, 2004.

For up-to-date information on which countries, if any, have received an extension, contact the appropriate country's embassy or consult the State Department's website at http://www.travel.state.gov.

Visa Lottery Reminder

Please remember that the registration period for the FY2005 Diversity Visa Lottery begins on November 1. For additional information, please see http://www.travel.state.gov/dv2005.html.

What's in a Name?

The Department of Homeland Security recently announced that its divisions which deal with immigration have dropped the word "Bureau" from their names. BCIS (Bureau of Citizenship and Immigration Services), BCBP (Bureau of Customs and Border Protection) and BICE (Bureau of Immigration & Customs Enforcement) are now known as USCIS, CBP and ICE.

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

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Significant Changes to L and H-1B Visa Classifications Contemplated by Congress

On July 24, two parallel bills, H.R. 2849 and S. 1452, were introduced which would substantially alter the L and H-1B visa programs. The proposed changes would include the following:

L visa program:

* Require employers to file an attestation with the Department of Labor (DOL) stating that the L-1 employee will not perform duties at the worksite of another employer where there are indicia of an employment relationship, the L-1 employer will provide wages that are the greater of the actual wage or the prevailing wage (similar to current H-1B prevailing wage requirements), and the employer did not displace US workers for 180 days before or after the filing of the L-1 petition.
- Increase the work experience requirement with the foreign employer from one year to two years
- Limit the duration of the L-1A to 5 years and the L-1B to 3 years
- For L-1B petitions, require the employer to attest that the employer has taken good faith steps to recruit US workers for the position
- Direct the DOL to impose a fee on employers for L-1 petitions

H-1B visa program:

- Make H-1B dependent provisions applicable to all H-1B employers
- Require H-1B employer to attest that it has not displaced an American worker 90 days before or after the filing of the petition
- Require H-1B employer to attest that it will not place the H-1B worker at a third party worksite where there are indicia of an employment relationship unless there is no displacement of a US worker at the worksite for 180 days before and after the H-1B worker is placed at the worksite
- Make the $1000 fee permanent

If passed, these bills could create a significant hardship to US employers who rely heavily on the L-1 and H-1B visa programs to employ foreign workers. If you employ L-1 and/or H-1B workers, we urge you to contact your Congressional representatives to voice your opposition to these changes. For more information, please contact us or download the L-1 Visa Issue Packet from the American Immigration Lawyers Association at www.aila.org.

Machine Readable Passports Required for Visa Waiver Entrants

The Department of State recently announced that, beginning October 1, all nonimmigrants seeking to enter the United States pursuant to the Visa Waiver Program (business visitors and tourists from the 27 participating countries listed below) must possess a Machine Readable passport. Nonimmigrants who do not have a Machine Readable passport after October 1 will require visas to enter the United States. This change includes all categories of passports (tourist, diplomatic and official) and also requires that each family member, including infants, has his or her own passport. This change ONLY applies to nonimmigrants seeking to enter the United States without a visa; it does not apply to persons applying for visas at U.S. consular posts.

The 27 countries currently participating in the Visa Waiver Program are: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

Significant Delays in Visa Processing at U.S. Consulates

New security procedures implemented at U.S. Embassies and Consulates around the globe are causing lengthy delays in visa issuance. Until recently, embassies and consulates exercised broad discretion in waiving the personal appearance requirement for visa issuance; nonimmigrants could apply for visas at most consular posts either by mail or through a drop box. At many consular posts, a personal interview is now required. This has created long backlogs in securing an interview appointment, with resulting delays of weeks in obtaining a visa.

Please keep this circumstance in mind when traveling abroad, or when sending your nonimmigrant employees overseas. It is still possible to obtain visas in Canada or Mexico and through the Visa Office, but processing times are increasing there as well. (The Visa Office is currently taking 10 to 12 weeks to issue a visa.) Planning ahead is more essential than ever when contemplating foreign travel. Please contact us for up-to-date information on processing issues, or consult http://travel.state.gov/links.html for information on specific consular posts.

Significant Delays in Processing at BCIS

Due in part to increased security procedures, processing times at BCIS (Bureau of Citizenship and Immigration Services, the successor agency to INS) have also increased. Perhaps most important is the delay in processing of employment authorization and advance parole applications. If you or one of your employees have pending applications to adjust status, it is now essential that you apply for employment authorization no later than 90 days before your current authorization will expire, and five or six months in advance may be advisable. Adjustment of status applications at the Service Centers are now taking over two years to adjudicate, and even some BCIS employees have admitted that matters are likely to get worse before they get better.

LCA Audits Reportedly on the Increase

We have recently heard that the Department of Labor (DOL) is reportedly devoting greater resources to conducting audits of Labor Condition Applications (LCAs) filed by employers of H-1B nonimmigrants. Since we believe that audits are still primarily triggered by complaints, employers who have

recently laid off employees may find themselves vulnerable to LCA audits. Employers found to have violated the LCA requirements may be liable for payment of back wages, may be subject to fines ranging anywhere from $1000 to $35,000 per violation, and may be disqualified from approval of future H-1B petitions for one to three years.

We strive to provide our clients with all the information they need to comply with the LCA requirements. We do realize, however, that the LCA requirements are onerous and not always easy to understand. If you have any questions, or wish assistance in conducting an audit of your LCA files, please do not hesitate to contact us.

"Transit Without Visa" Option No Longer Available

On August 2, the Department of State and the Department of Homeland Security (DHS) suspended two programs that allow certain international air passengers to travel through the United States for transit purposes without first obtaining a U.S. visa. The programs, known as the Transit without Visa program (TWOV) and the International to International transit program (ITI), have been suspended. Under both programs, passengers who normally would have been required to obtain a visa to enter the United States were permitted to change planes in the United States en route from one foreign destination to another. The TWOV program, unlike the ITI program, allowed passengers to travel through more than one U.S. airport.

This change does not affect U.S. citizens or nationals of countries who are eligible to enter the U.S. under the Visa Waiver Program. For additional information, please contact us or consult the Department of State website at http://travel.state.gov.

Credentials Certification Required for Nonimmigrant Health Care Professionals

On July 25, DHS published a final rule implementing the requirement for health care professionals, other than physicians, to obtain certification from an approved professional credentialing organization before entering the US as nonimmigrants seeking employment. The rules also apply to individuals extending their stay or changing to a work-authorized status for employment as a health care professional.

The rule requires individuals seeking a work-authorized nonimmigrant visa status to work in the following occupations:

- Licensed Practical Nurses, Licensed Vocational Nurses, and Registered Nurses
- Physical Therapists
- Occupational Therapists
- Speech-language Pathologists and Audiologists
- Medical Technologists (also known as clinical laboratory scientists)
- Medical Technicians (also known as clinical laboratory technicians)
- Physician Assistants

The rule does not apply to physicians, individuals seeking admission to the US to perform services in a non-clinical health care occupation (such as medical teachers, medical researchers, or managers of health care facilities), individuals coming to the US to receive training in H-3, F-1 or J-1 status, or the spouse and dependent children of any immigrant or nonimmigrant.

The certification will verify the individual's credentials and provide evidence that he/she has the required English language proficiency. There are currently three organizations which have been approved by the Attorney General to issue these certifications:

the CGFNS (www.cgfns.org), for all occupations; the National Board for Certification in Occupational Therapy (www.nbcot.org), for occupational therapists, pending final adjudication of its credentialing status; and the Foreign Credentialing Commission on Physical Therapy (www.fccpt.org), for physical therapists, pending final adjudication of its credentialing status.

The rule goes into effect on September 23, 2003; however, DHS has indicated that it will allow health care workers affected by the rule additional time to comply. Prior to July 26, 2004, the certification requirement will be waived for nonimmigrants subject to this requirement who enter the US or change or extend nonimmigrant status in the US. The nonimmigrant will be granted status valid for one year. To be readmitted or extend/change status after that time, the nonimmigrant must have obtained certification.

If you are or if you know a nonimmigrant working in one of these professions, we strongly suggest that you contact the appropriate credentialing organization to obtain the necessary certification as soon as possible. As obtaining the certification may take several months, obtaining it now could prevent problems with future entries to the United States, or delays in adjudication of future nonimmigrant petitions. Please feel free to contact us if you have any questions.

Visa Lottery Scheduled for November and December 2003

The Department of State has announced instructions for this year's Diversity Visa Lottery (DV-2005). This year, lottery applications must be made online at www.dvlottery.state.gov from November 1, 2003 to December 30, 2003. Paper entries will not be accepted. For more information, please contact our office or consult http://travel.state.gov/dv2005.html.

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The Demise of INS

As many of you know, effective March 1, 2003, the Immigration and Naturalization Service was broken up and integrated into the Department of Homeland Security. Immigration benefit applications are being handled by the new Bureau of Citizenship and Immigration Services (BCIS). Interior enforcement is being handled by the Bureau of Immigration and Customs Enforcement (BICE). Border enforcement is being handled by the Bureau of Customs and Border Protection (BCBP). At of the present time, there have been no significant changes made with regard to offices and personnel; all benefit applications are filed with the same offices, with the same fees. We have been advised that checks written in payment of filing fees are to be made payable to the Department of Homeland Security.

Please note that Cleveland BCIS and many other district offices are no longer accepting applications for employment authorization documents (EADs) or advance parole in Employment-Based Adjustment Cases. All applications associated with employment-based adjustment applications are to be filed with the BCIS Regional Service Centers.

Effects of the War in Iraq

The war in Iraq is destined to have an impact on U.S. immigration policy and practice, and we have already seen some changes, as described below.

Closures/Delays at U.S. Embassies and Consulates

Many U.S. embassies and consulates ("posts") have closed to all but emergency services for American citizens, in part due to concerns about potential terrorist attacks. We have received information that some or all posts have closed in Afghanistan, Argentina, Australia, Egypt, France, Indonesia, Israel, Jordan, Kazakhstan, Kenya, Macedonia, Nigeria, Norway, Pakistan, Romania, Saudi Arabia, South Africa, Syria, Turkey, Venezuela and Yemen. At other posts, including those in Bahrain, Brazil, Kuwait, Lebanon, Oman, Qatar, and United Arab Emirates, the State Department has reportedly ordered (or recommended) that "non-essential" employees and/or dependents of consular employees be sent back to the United States. Posts in other countries may be affected as the war progresses. Many posts that haven't closed are operating with a skeletal staff, and therefore processing of nonimmigrant and immigrant visa applications has slowed considerably. Before undertaking ANY foreign travel which will require application for a U.S. visa, please contact us or the appropriate consular post, or consult the Department of State website (http://travel.state.gov) for up-to-date information on visa processing. CNN's website, www.CNN.com, may also have up-to-date information.

Even if visa applications continue, delays may also occur after the visa interview as posts vet names of applicants through the Department of State's lookout system and FBI databases. Because of numerous variations in name spellings, the State Department uses a phonics screening device to check applicants. This can result in applicants with names similar to those of suspected terrorists, criminals, or others deemed ineligible to enter the United States being subjected to additional security checks. At the present time, a "hit" in one of these government databases requires the applicant to have their fingerprints taken and checked by the FBI for a determination of identity. This can add six weeks or more to the visa screening process. There is no way to predict whether an applicant will be delayed in this way, and there is no way to expedite the process.

In addition, visa applications are also compared with the State Department's Technology Alert List. Applicants whose work is related in some way to the technologies on the list can face an additional screening process due to the "potential sensitive nature" of their travel to the U.S. In our experience, citizens of China and Middle Eastern countries are more likely to be subjected to this additional screening, although the State Department may subject citizens of any country to the screening. This screening can add anywhere from 4 to 8 weeks, if not longer, to visa processing. Additional information on the Technology Alert List may be found on the State Department's website at http://www.travel.state.gov/state147566.html.

One way to take some of the risk out of visa application is to apply for a new nonimmigrant visa by mail through the Visa Office in St. Louis, Missouri. Current processing time is approximately eight weeks, and applications may not be expedited. Only certain applications are accepted; applicants getting a type of visa they have never had before, and F-1 or J-1 visa holders, must apply at a U.S. consular post outside the United States.

Effects of War on Domestic Travelers

The Department of Homeland Security (DHS) recently implemented "Operation Liberty Shield" which is purported to tighten security at U.S. airports and border posts. Local, state and federal authorities have begun screening cars and passengers at airports and land border posts, and surveillance of travelers has been stepped up. Before any travel, foreign and domestic, you are urged to give yourself extra time to account for these additional security measures.

Interviews of Thousands of Iraqi-Born Individuals in U.S.

DHS has also indicated that, in cooperation with the FBI, it will interview thousands of Iraqi-born individuals in the United States. Individuals who are suspected to be terrorists or to be somehow tied to terrorist activities will be detained. Individuals found to have immigration violations will also be detained and possibly deported. This operation is expected to be similar to that involving 5000 men conducted in the months following September 11, 2001.

Detention of Asylum Seekers

DHS has indicated that it will begin detaining applicants for asylum from countries in which al-Qaeda, al-Qaeda sympathizers or other terrorist groups operate. Applicants will be detained throughout the asylum process, which can take years to complete.

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Special Registration ("NSEERS") Procedures, Continued

On January 16, 2003, INS added another list of countries to Call-In Registration, to become effective February 24, 2003. Male nonimmigrants, born on or before February 24, 1987, who are citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan or Kuwait, who lawfully entered the United States as nonimmigrants before October 1, 2002 and who plan to stay in the United States until at least March 28, 2003, must register with their local INS office between February 24, 2003 and March 28, 2003. These individuals must go to a designated INS office, where they will be asked a number of questions, fingerprinted, and photographed.

NOTE: INS is taking the position that the Special Registration requirement applies to individuals who were born in one of the above-mentioned countries, even if an individual is not a citizen of one of the countries. If there is any doubt regarding whether an individual is subject to the registration requirement, he is urged to err on the side of caution and appear for registration.

NOTE also, however, that the INS General Counsel has reportedly indicated that individuals who enter the United States pursuant to advance parole, even if they are nationals of one of the designated countries, are NOT subject to special registration. We still do not have written confirmation of this opinion. If you or one of your employees or colleagues is in this situation, please contact us or other qualified immigration counsel for advice.

Special Registration now applies to male nonimmigrant nationals of Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. Additional countries are expected to be added in the coming months.

Individuals subject to the registration requirements must register annually (plus or minus ten days from the anniversary of the initial registration). When departing the United States, even for brief trips, registrants must report to INS and depart through specially designated ports of departure. Additional information concerning Special Registration, including the list of designated ports of departure, may be obtained from the INS website at http://www.ins.gov/graphics/lawenfor/specialreg/index.htm. Please consult www.ins.gov for updates to this information.

If you are, or if you know, a nonimmigrant from any of the above-mentioned countries, we urge you to carefully review the information on NSEERS from the INS website. Failure to comply with the Registration requirements can result in removal (deportation) from the United States. If you have any questions regarding these procedures, please do not hesitate to contact us.

More on Arrests at Registration

In our last update we reported that INS was arresting individuals appearing for special registration if they were out of status or if their underlying nonimmigrant status had expired while an adjustment of status application was pending. INS is continuing to arrest individuals who are out of status. However, they have reportedly reversed the policy to arrest adjustment applicants whose underlying non-immigrant status had expired.

Visas to be Required for All Canadian Landed Immigrants

You may recall that in July we reported that the State Department was planning to change its regulations at 22 CFR 41.2(b) to require "aliens resident in Canada… having a common nationality with nationals of Canada" to obtain nonimmigrant visas to enter the United States. This proposed change was withdrawn in October. On February 3, 2003, INS and the State Department resurrected the change. Effective March 17, 2003, all landed immigrants in Canada seeking to enter the United States as non-immigrants must possess a valid passport and nonimmigrant visa to enter. Effective immediately, U.S. consular posts in Canada will accept nonimmigrant visa applications by mail from landed immigrants residing in Canada.

Additional information on the policy change, including a list of affected countries and visa application procedures, may be found by consulting the website of the U.S. Embassy in Canada at http://www.usembassycanada.gov.

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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.

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H-1B CAP TO BE REACHED AGAIN THIS YEAR!!

As you may remember, last year the H-1B cap, the number of H-1B visas which can be issued in any fiscal year, was reached in May. As a result, the U.S. Congress raised the cap from 65,000 to 115,000 for FY1999 and 2000, 107,500 for FY2001, and back down to 65,000 thereafter. Congress also raised the H-1B fee from $110 to $610. The increase must be paid by the U.S. employer, and is intended to help reduce processing backlogs and to fund training programs for U.S. students. We have recently been informed by the Immigration & Naturalization Service (INS) that, despite the new legislation, the cap is likely to be reached sometime between April and June.

We therefore strongly advise all companies who seek to obtain H-1B visas for new employees to begin the application process as soon as possible. Failure to act in a timely manner could result in employees being forced to go off the payroll or to leave the United States until October 1.

If you have any questions regarding the H-1B cap or your company's specific situation, please call Rosner and Associates.

New Filing Procedures for Labor Condition Applications for H-1Bs

The U.S. Department of Labor (DOL) has recently implemented a new procedure for filing Labor Condition Applications (LCA), the prevailing wage documentation which must be submitted with every H-1B visa petition. Previously, the LCA was filed by mail, Federal Express or fax, reviewed by an overworked staff member, and returned via mail or Federal Express. Some DOL Regional Offices were taking up to eight weeks to process and return LCAs, a form which by law is to be processed and returned within 10 days.

In order to alleviate this problem, the DOL has implemented an automated filing system for LCAs. The system requires that the LCAs be completed on a new form using a form filler software program developed by the DOL. If you have not already seen the new form, it is now two pages, but should result in faster processing. The DOL now seeks to process LCAs filed under the new system in as little as one day. So far, they have yet to meet these goals. However, we do believe the new system will be a considerable improvement over the old.

If you have questions regarding the new LCA form, please call Rosner and Associates.

Green Cards for Chinese and Indian Employees

As many of you are aware, U.S. immigration law imposes quotas on the numbers of people from each country who can immigrate to the United States in various categories. Because there are more people from some countries who wish to immigrate than there are visas available, there are significant backlogs for many visa categories.

Each month, the U.S. Department of State (DOS) issues a list of priority dates for each immigrant category. A priority dates is the date on which one files an immigrant visa petition or a labor certification application. If a particular priority date for a classification has not been reached, an individual with a priority date later than the DOS priority date for that classification may not immigrate or adjust his or her status to permanent resident.

In every family-based category (individuals seeking to immigrate based on a family relationship to a U.S. Citizen or Permanent Resident), there is a significant backlog - for Philippine citizen siblings of U.S. Citizens, for example, the backlog is over twenty years. (Note that there is no backlog for immediate relatives of U.S. Citizens - spouses, parents, or unmarried children under 21.) There is also a backlog in some employment-based categories for nationals of certain countries.

Citizens of mainland China and India are subject to a backlog in employment-based categories ranging from two to four years. If you have employees who are citizens of these countries, you should be aware that these backlogs may prevent an employee from remaining in the United States, even if an immigrant visa petition has been approved.

For example, at the present time, a Chinese national who has an approved immigrant visa petition in the third employment-based preference, as a professional with a bachelor's degree, may not file an application to adjust status if his labor certification was filed after February 22, 1995. As soon as his priority date is reached, he may file the application. Until then, he must remain in valid nonimmigrant status. If he runs out of time in nonimmigrant status - for example, he reaches his six year H-1B limit - he may not remain in the United States until his priority date is reached. If he does remain in the United States for more than six months after the expiration of his nonimmigrant status , he will be unable to adjust his status to permanent resident even when his priority date is reached.

This does not mean that an employee facing a substantial backlog will never be able to obtain permanent residence. Given the lengthy processing times for labor certifications and immigrant visa petitions, there is a good chance the priority date will be reached by the time an immigrant visa is approved. It does mean, however, that employers should be aware of this issue when making decisions regarding immigration benefits for their employees.

To obtain a current list of priority dates,

you may contact Rosner and Associates or check the DOS web page at http://travel.state.gov/visa_bulletin.html.

Labor Certification Issues: The Reduction in Recruitment Option

As many of you have recently learned, labor certification processing times are extremely long in some areas of the country. As a result of these processing delays, and the recently announced commitment of the DOL to process "Reduction in Recruitment" (RIR) applications on an expedited basis, we have been advising our clients to seek RIR wherever appropriate. RIR involves a demonstration to the DOL that an employer has adequately tested the labor market in the six months immediately prior to filing the application, and has found that there are no qualified U.S. workers available. RIR applications are processed much more quickly than standard applications, and have the added benefit of allowing the employer to make subjective decisions regarding a job applicant's qualifications, something which is impossible in a standard application.

Companies with technical employees, such as engineers and computer professionals, face a labor market with a shortage of qualified U.S. workers. Chances are that most employers involved in such fields will hire a foreign national at some time. In this period of very low unemployment, potential employees often have a wide variety of offers from which to choose. These potential hires may also bargain for permanent residence as a condition of accepting employment. This being the case, it is important that companies with vacancies for such employees keep detailed records regarding their recruitment activity. Keep track of the sources you use, copies of the ads you place, and record the number of resumes you receive from each source, the number of applicants you interview, the number you hire, and the general reasons for rejecting other applicants.

Be aware that RIR applications must be filed within six months of the recruitment. If you wish to keep a promising employee, you should begin the labor certification process as soon as possible to be eligible for RIR and to avoid priority date problems, as discussed above. You should also remember that even if the recruitment you conducted to hire your foreign national employee is more than six months old, you can use more recent recruitment data for similar positions to apply for RIR. Note that you can also use regional recruitment data. If your company has offices in other parts of the country with similar hiring patterns - offices in the Midwest or New England, for example, you may be able to use the recruitment activities of other offices to strengthen your own RIR application.

Although keeping RIR in mind during the hiring process when you have no obvious foreign national in mind for the position may seem to be a wasted effort, taking the time to document your recruitment efforts may pay off handsomely in the event you do hire such an employee, by substantially reducing the costs associated with labor certification and allowing you to keep a valued employee.

If you have questions regarding RIR, please contact Rosner and Associates for additional information.

INS Raises Processing Fee for Naturalization

Effective for applications filed on or after January 15, 1999, the processing fee for Form N-400, Application for Naturalization, is $225. This fee increase was announced in August of 1998, but did not become effective until January 15. The fee was raised despite INS promises that it would not raise the fee until naturalization processing times were significantly reduced. INS continues to take nearly two years to process naturalization applications.

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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