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.

January 2004

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.

H-1B VISA CAP RAPIDLY APPROACHING

If you are or are hiring a foreign national who will need H-1B status, we recommend that you contact us as soon as possible. The number of H-1B visas available for fiscal year 2004 reverted to 65,000 on October 1, 2003. Although it is not possible to predict precisely when the number of available H-1B visas will be exhausted, based on the number of H-1B petitions that have been approved or are currently being processed, it is very likely that this year's H-1B visa "cap" will be reached by mid-February. Those H-1B visa petitions that are subject to the cap and are not approved before the cap is reached will have to wait until October 1 to start employment in H-1B visa status.

The H-1B visa cap applies to all H-1B petitions, except those for an extension of stay, for employees of higher education institutions, nonprofit research organizations or government research organizations, and for Chilean and Singaporean nationals applying for an extension of stay or a change of status to H-1B. Under two new Free Trade Agreements, 1,400 H-1B visas are reserved for citizens of Chile, and 5,400 for citizens of Singapore. Despite the fact that there is almost certain to be a large number of allocated visa slots unused by citizens of Chile and Singapore, these are unlikely to revert to general availability prior to the last quarter of the fiscal year.

For all H-1B workers who are not exempt from the cap, such as foreign students working under optional practical training, it is essential that petitions be filed as soon as possible, via Premium Processing, in order to avoid the possibility of denial on the basis of a lack of available visas. U.S. Citizenship and Immigration Services (USCIS) has indicated that it may suspend the Premium Processing program for H-1B cap petitions, but it has not yet done so.

If you believe that you or one of your employees may be subject to the cap, please contact Rosner & Associates as soon as possible.

CHANGES IN TN VISA PROCEDURES FOR MEXICAN CITIZENS

TN visa application requirements for Mexican citizens have been relaxed. On January 1, 2004, a North American Free Trade Act (NAFTA) provision subjecting Mexican citizens to a 5,500 annual numerical cap, as well as additional procedural requirements, expired. There is now no quota for Mexican TN visa applications, and Mexican applicants are no longer required to obtain approval from USCIS and the Department of Labor prior to applying for TN visas. Mexican citizens may now apply for TN visas directly at a U.S. consulate abroad.

These changes are a considerable improvement over previous procedures for Mexican applicants for TN status. With the expiration of restrictions that have made this visa category unattractive to eligible Mexican applicants, the TN visa category is now a fast and inexpensive alternative for degree-holding professionals who choose not to apply for H-1B visa status.

The Department of Homeland Security reportedly plans to publish an interim rule in the near future that will provide information on the new procedures.

PRESIDENT BUSH PROPOSES NEW "GUEST WORKER" IMMIGRATION PROGRAM

President Bush recently proposed changes to current immigration law that would enable undocumented immigrants in the United States, and foreigners living abroad, to apply for the right to work legally in the United States. His proposal would entitle eligible applicants to three-year visa status with the possibility of at least one extension.

President Bush's proposal has met with enthusiastic support from business leaders, who believe that this type of immigration reform could provide significant benefit to U.S. businesses by providing an influx of legal workers to take jobs that have historically been difficult to fill with U.S. workers. Mexican President Vicente Fox has given the proposal his support, noting that providing legal recognition of Mexican workers in the United States is an important first step in improving border relations between the two countries.

The President's proposal, however, has met with stiff opposition. Some are concerned with the fact that the proposal seems to reward illegal behavior. Immigration advocates express doubt that the proposal in its current form adequately protects the interests of immigrants who seek the benefit of legal status. In particular, they point out that the President's proposal fails to address what will happen to this class of foreign workers at the expiration of their stay. President Bush has not indicated that eligible applicants will be able to apply for permanent residence. To the contrary, he has suggested that workers will be expected to return to their home countries, and has emphasized the temporary nature of the proposed status. Immigration experts caution that anticipating this class of workers to return home at the expiration of their authorized stay is an unrealistic expectation which could cause significant problems in the future.

Critics suggest that the proposal, which has yet to be drafted in legislative form, is unlikely to pass this year, if at all. We will advise you as developments in this area emerge.

USCIS CLARIFIES ROVING H-1B EMPLOYEE ISSUES

U.S. Citizenship and Immigration Services ("USCIS") has issued clarification on how employers may protect the status of H-1B employees who are transferred from one location to another within the U.S., but who work in the same occupation.

USCIS has informally indicated that H-1B workers transferred to a new geographic area who continue to work for the same employer in the same professional position need not file amended H-1B visa petitions provided the employer obtains a certified Labor Condition Application ("LCA") prior to the move. Under these new guidelines, an employer is only required to notify USCIS of the geographic change at the time that an extension is filed. Keep in mind as well that all foreign nationals

in the U.S. must notify the USCIS of a change in residence by filing Form AR-11, available from Rosner and Associates or on the USCIS website, http://uscis.gov.

USCIS cautions that this matter is currently under review and is subject to change. We will notify you in the event that there is any change in this policy.

US-VISIT UNDERWAY

As you may recall from our last newsletter, the Department of Homeland Security recently implemented new procedures at ports of entry into the United States in an attempt to add an additional layer of security to U.S. border control. The program, which requires the use of scanning procedures to collect biometric data at U.S. ports of entry, is called the "United States Visitor and Immigrant Status Indicator" (US-VISIT).

The first phase of US-VISIT became operational on January 5th at 115 airports and 14 seaports across the country. All U.S. ports of entry must employ the US-VISIT program by December 31, 2005.

The program has attracted criticism from opponents who question its effectiveness as a security measure, particularly in relationship to the cost of the program, which is estimated to be $380 million this year. Moreover, critics caution that restrictive programs like US-VISIT have contributed to a 20% drop in foreign visits to the United States, injuring the viability of the tourism industry.

The program has also attracted negative attention from countries that take offense to its mandates. Bangladesh and Indonesia have made official protests to the screening, while Brazil has introduced similar fingerprinting and photographing restrictions on American visitors to that country.

For additional information on US-VISIT and a list of ports of entry using the new program, please consult the DHS website at www.dhs.gov/us-visit.

The "Deemed Export" Classification:

What it is, Who it Affects, and Why it is Important

What it is

In the United States, controlled technology becomes a "deemed export" when it is released to a foreign national located in the United States. Two governmental agencies assume primary responsibility for controlling technology in the United States, including deemed exports. The Commerce Department's Export Administration Regulations (EAR) control most technology used in the development, production, or use of commercial items. The State Department's International Traffic in Arms Regulations (ITAR) control exports related to the military.

Both EAR and ITAR interpret a release of technology to constitute a deemed export when a foreign national gains either visual or oral insights into U.S. technology. It is important to note that this "release" can occur in cases where a foreign national is not working directly with controlled technology, but has access to this information, e.g., through a company Intranet.

With such a broad definition of what is included in the deemed export classification, employers must be increasingly vigilant in ascertaining who has access to information that could potentially require an export license. Potential violations can arise in situations where there is unrestricted server access, or where an unlicensed employee has "Master" access to what is otherwise considered privileged information.

Who it Affects

Deemed Export Requirements apply to all foreign-born employees who are not U.S. citizens, lawful permanent residents, asylees, refugees or foreign nationals in an otherwise protected class. Foreign workers from countries subject to U.S. embargoes, and particularly those countries designated as State Sponsors of Terrorism, will likely require an export license for the release of virtually any EAR controlled technology.

For dual nationals, the Commerce Department has indicated that it considers the last citizenship status obtained to be his or her nationality for the purposes of ascertaining the applicability of deemed export requirements.

Prospective employers should contact a compliance expert in ascertaining whether a license will be necessary in a specific case. Under ITAR, the release of military technology requires a license for virtually all foreign nationals, with very limited exceptions. For EAR-controlled technology, however, the combination of the level of technology involved and the foreign national's home country will determine whether a license is required.

Why it is Important

According to recent reports, the Commerce Department has begun to monitor applications for employment based visas, and particularly H visas, more closely. The Department's Bureau of Industry and Security has conducted sporadic spot checks of foreign nationals who have been granted H visas to work in sensitive industries, including interviews with their employers.

U.S. Customs and Border Protection has begun to focus more energy on its Export Enforcement Program and deemed exports. Companies have reported that CBP officials have conducted random inquiries regarding the relationship between foreign employees and their access to controlled technologies.

The FBI also has become increasingly concerned with the relationship between foreign workers and the release of technology deemed to be an export under the EAR and ITAR. As part of their investigative activities, FBI agents have visited employers, and in particular, large, mainstream companies, in order to learn more about projects on which particular foreign nationals have been working and to ascertain whether or not they are licensed.

Lastly, heightened security at consular posts has made it critically important for U.S. companies looking to employ foreign nationals in high technology fields to exercise special care and foresight in meeting compliance requirements in advance of specific requests to do so. The State Department's increasingly stringent regulations may cause delays in cases where regulations mandate that the consular officer receive clearance before issuing a visa. Checking for compliance with the deemed export regulations at the front end of the visa application process will save time and money in the long run.

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H-1B Cap Reached

U.S. Citizenship and Immigration Services (USCIS) reported yesterday that the H-1B cap of 65,000 visas has been reached for Fiscal Year 2004. Effective February 18, 2004, USCIS will no longer accept petitions seeking H-1B status for workers subject to the cap. USCIS will, however, continue to process all H-1B petitions for cap-subject workers received by USCIS before the close of business on February 17, 2004. H-1B petitions for cap-subject workers may be submitted under the FY2005 H-1B count on or after April 1, 2004. The soonest those individuals could begin working in H-1B status would be October 1, 2004.

Petitions for individuals currently working in H-1B status are not subject to the cap. Therefore, USCIS will continue to process petitions filed to:

Extend the amount of time a current H-1B worker may remain in the United States;

Change the terms of employment for current H-1B workers;

Allow current H-1B workers to change employers;

Allow current H-1B workers to work concurrently in a second H-1B position.

USCIS also notes that petitions for new H-1B employment are not subject to the annual cap if the H-1B worker will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or a governmental research organization. USCIS will also continue to process H-1B petitions for workers from Singapore and Chile pursuant to the Free Trade Acts with those countries.

Reaching the cap early can result in some employees facing a gap in employment authorization. New university graduates employed pursuant to F-1 Optional Practical Training often find themselves in this situation. If you have any such employees, we urge you to contact us as soon as possible to discuss what must be done to ensure compliance with U.S. immigration law.

USCIS Proposes Filing Fee Increase

On February 3, USCIS proposed an increase of its filing fees for most applications. The fee increase would average $55 for most applications, and would raise the biometric fee from $50 to $70. For example, the filing fee for Form I-129, used for employment-based nonimmigrant petitions, would be raised to $185; Form I-765, for employment authorization, would go up to $175; Form I-485, for adjustment of status, would reach $315; and Form N-400, for naturalization, would increase $60, from $260 to $320.

The fee increase is still just a proposal. The public may comment on the rule until March 4. For additional information and a complete list of the proposed fees, please consult the USCIS website at http://uscis.gov <http://uscis.gov/>. We will advise you when the fee increase becomes effective.

Reminders

In past newsletters we've mentioned the following items, and we thought that a reminder might be useful:

- The status of petitions filed with USCIS Service Centers may be checked online at https://egov.immigration.gov/graphics/cris/jsps/index.jsp. That site also lists processing times for USCIS District Offices and Service Centers. We suggest that you take the posted processing times with a grain of salt, as recent experience has shown that they aren't always accurate.
- Processing times for labor certification applications pending with State Workforce Agencies or the U.S. Department of Labor may be checked online at http://www.ows.doleta.gov/foreign/times.asp. Based on our experience, these processing time reports do tend to be accurate.
- Speaking of processing times, they continue to increase. Adjustment of Status applications at the Texas Service Center, for example, are now taking nearly three years to process, while Applications for Reentry Permits can take nearly 18 months. USCIS says that its proposed fee increase is intended to address this backlog.
- USCIS regulations require that all "aliens" in the United States, including nonimmigrants AND permanent residents, must notify USCIS of changes of residential address within 10 days of the move. This is done on Form AR-11, which may be accessed online at http://uscis.gov/graphics/formsfee/forms/ar-11.htm. Individuals who have applications pending at particular USCIS offices should also notify those offices of any address change.

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Filing Fee Increases Effective 4/30/2004

Effective this Friday, April 30, 2004, US Citizenship and Immigration Services (USCIS) will implement filing fee increases for immigrant and nonimmigrant filings in all categories. The fee increase is approximately $55 across the board.

New fees for commonly used forms are listed below. Form I-129 is filed in applications for H, L, E, O and TN status and Form I-539 is filed for derivative status in those categories. Form I-485 is used in adjustment of status cases and Forms I-131 and I-765 are applications for Travel Documents and Employment Authorization, respectively. Form N-400 is an application for naturalization. The biometric fee, which accompanies applications for permanent residence and naturalization, among others, will be raised from $50 to $70.

Form	*Current Fee*	*New Fee*
Form I-129	$130	$185
Form I-539	$140	$195
Form I-485	$160/$255	$215/$315
Form I-765	$120	$175
Form I-131	$110	$165
Form I-140	$135	$190
Form I-130	$130	$185
Form N-400	$260	$320

For a complete list of new filing fees, please visit the USCIS website at http://uscis.gov.

PERM Sent to OMB

On February 23, 2004 the U.S. Department of Labor (DOL) sent its final rule on the revised Labor Certification system to the Office of Management and Budget (OMB) for review. When published, this rule will substantially alter the Labor Certification process, possibly shortening the length of the process by diminishing the role of state agencies in adjudications.

The rule, known as the Program Electronic Review Management System, or PERM, reportedly proposes changes to several aspects of the Labor Certification process, including processing times, the role of state agencies and prevailing wage. Among many changes that the published rule is expected to implement are possible changes in the eligibility of employees who rely on past experience with their sponsoring employer to qualify for labor certification.

Under the current Labor Certification system, prior experience with a sponsoring employer will qualify as past experience under certain conditions. Under PERM, past experience with a sponsoring employer may be barred as qualifying experience. Consequently, it is possible that some foreign workers who qualify for Labor Certification under the regulations as they currently exist will no longer qualify after PERM is published in its final form.

Although sources at the DOL have indicated that the regulation has been revised to allow some experience from sponsoring employers, at this point the parameters of allowable past experience are unclear. It is possible that the OMB may send the regulation back to the DOL for further revisions, or the regulation may be published by the end of May, with implementation as early as October 1.

Our expectation is that PERM will be operative by October 1, 2004. Without knowing the exact provisions of the rule, it is hard to say with precision how PERM will affect our clients. However, in order to avoid any adverse affects on currently available immigration options, we suggest that employers of foreign workers who anticipate sponsoring them for permanent residence in the United States through labor certification should avoid delay in beginning the process. If applicable foreign workers are eligible under current regulations, employers should consider starting as soon as possible.

If you have employees who you believe may be affected by changing experience requirements, we urge you to contact Rosner & Associates as soon as possible to discuss this matter.

I-9 Compliance Requires Careful Attention

The Immigration Reform and Control Act of 1986 made all U.S. employers responsible for verifying the employment eligibility and identity of employees hired after November 6, 1986. Although enforcement of I-9 compliance has been sporadic to date, we have recently received anecdotal evidence of increased I-9 audits initiated by USICE, the immigration enforcement arm of the Department of Homeland Security.

In the event of an audit, employers may face substantial fines and penalties for failing to properly complete and maintain I-9 records, even where no unauthorized or illegal employment is found.

As a reminder, the best time to correct an I-9 is before you are audited. Our firm is willing and able to assist you in conducting an internal I-9 audit. For more information, please contact Rosner & Associates.

The H-1B Cap: Implications for FY' 05

In February, USCIS reported that the H-1B cap of 65,000 had been reached for Fiscal Year 2004. As there is no indication that

the cap will be raised for Fiscal Year 2005, it is very important that sponsoring employers plan ahead in petitioning for H-1B employees for the coming year.

The government's 2005 fiscal year begins October 1, 2004. Petitions for H-1B status subject to the cap began to be accepted on April 1, 2004. The next several months will see an influx of H-1B petitions submitted to USCIS for FY 2005. Although USCIS reported recently that the number of FY2005 H-1B filings since April 1 has been lower than expected, there is a very real possibility that the cap will be exhausted prior to the commencement of the next fiscal year.

We strongly suggest that employers who would like to hire or extend the employment of cap-subject workers for positions beginning in late 2004 or 2005 should file petitions now to ensure that employment is not barred by the FY 2005 cap. Employers may wish to consider submitting the extra $1,000 fee for premium processing to ensure priority adjudication in individual cases, although at the present time we do not believe this is necessary.

As a reminder, the cap applies to new H-1B employees only. Petitions for individuals currently working in H-1B status are not subject to the cap. Consequently, employees who wish to extend their employment with the same employer OR who wish to extend their H-1B employment with a different employer are generally not barred by the cap.

If you believe that you or an employee could potentially be barred for employment in 2005 by operation of the H-1B cap, please contact us immediately to discuss available options.

If you value the H-1B visa as a tool for hiring foreign labor in your company, please consider contacting your Congressional representative to advocate raising the cap. Please contact us for sample letters.

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Border Entry Issues US-VISIT

The Department of Homeland Security has recently confirmed that the "United States Visitor and Immigrant Status Indicator" (US-VISIT), which implements scanning procedures to collect biometric data at U.S. Ports of Entry into the United States, will be extended to visitors who enter the United States on the Visa Waiver Program on or after September 30, 2004. This will result in an increase of 13 million people subject to US-VISIT each year.

The Visa Waiver Program (VWP) enables citizens of certain countries to travel to the United States for tourism or business for 90 days or less without obtaining a visa stamp in their passports. VWP countries are predominately European countries whose citizens are statistically unlikely to remain in the United States after the expiration of their authorized stay. Although citizens of VWP countries will still be able to travel to the U.S. without a visa after September 30, they will be required to have their biometric data collected before gaining admission to the United States.

US-VISIT, which became operational on January 5, 2004 at 115 airports and 14 seaports across the country, is expected to be in place at the 50 largest U.S. land Ports of Entry by December 31, 2004. It is not clear at this time how much the program will affect travel to the U.S. once the program is fully operational. Currently, travelers affected by the program are reporting some delays.

For additional information, please consult the US-VISIT website at:

http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi _image_0006.xml.

Biometric Passports

Biometric passport requirements are expected to go into effect on October 26, 2004 for all countries which participate in the VWP. All foreign nationals seeking to enter the U.S. pursuant to the VWP after that date must possess a biometric passport. If they do not possess such a passport, they are not eligible to enter the U.S. pursuant to the VWP, and must apply for a visa stamp at a U.S. consulate abroad before seeking admission to the United States. At the present time, various legislation is pending in Congress which would extend the biometric passport deadline; it remains to be seen whether this legislation will become law.

State Department to Cease Visa Revalidations after July 16

As most of you know, a grant of extension of nonimmigrant status from U.S. Citizenship & Immigration Services does not automatically renew the validity of a U.S. visa. Generally, visa renewals are required for foreign visitors, including temporary workers and students, presently in the U.S. who wish to travel outside of the United States.

Nonimmigrants have traditionally had two options for renewing a visa. He or she may apply at a U.S. consular post in his or her home country, or, in some circumstances, at a U.S. Embassy or Consulate in a third country. The drawback to this option is that it can take weeks, or even months, in some cases, to schedule a visa appointment at many U.S. Embassies and Consulates around the world. Alternately, a nonimmigrant may apply for a new visa from within the United States by applying by mail with the Department of State. Although this process, known as visa revalidation, can leave an applicant without a passport for several months, it enables an applicant to apply for a new visa without leaving the United States. This option, however, will soon be eliminated.

On June 23, the Department of State issued a public notice announcing its discontinuance of revalidation of C, E, H, I, L, O and P visas. Citing the Department's inability to adequately handle increased security screenings as the impetus behind the decision, the Department will not process applications received after July 16, 2004. After that date, applicants will need to apply for visas through a U.S. consular post abroad. The Department of State has indicated that it will direct all visa adjudicating posts to accommodate on a priority basis applicants who would have been eligible to apply for visa revalidation from within the U.S.; however, it remains to be seen what effect, if any, this directive will have on the speed with which a nonimmigrant can renew a visa.

If you require further information on visa revalidation or visa application procedures, please contact Rosner & Associates.

Drop-box Procedures to Cease at U.S. Consulates in India

The U.S. Embassy in New Delhi, India has indicated that all U.S. consular posts in that country will stop accepting applications via the drop-box procedure on various dates within the next month. All visa applicants in India will soon require personal interviews and will be subject to fingerprinting, with some exceptions. Delays in obtaining appointments may be significant — weeks or even months. Other posts around the world have already implemented this procedure, or will do so soon. If you or one of your employees will

require a visa to return to the U.S. after foreign travel, you are strongly advised to check on existing procedures before travel. All visa applicants should be aware of the need for flexibility in travel schedules due to the inability to predict visa processing times at U.S. consulates. If a traveler cannot be flexible due to job, family or other considerations, foreign travel may be ill-advised at this time.

To learn more about visa processing in India, please consult the Embassy's website at:

http://newdelhi.usembassy.gov/wwwhpr62204.html

For up-to-date procedures at other U.S. consular posts, please consult the Department of State's website for links to individual posts:

http://travel.state.gov/links.html

Rule Proposed to Help F Visa Holders Seeking H Status

With the dramatic decrease in the numerical cap on H visas that became effective at the start of Fiscal Year 2004, many prospective H-1 nonimmigrants were unable to obtain status before the cap was met. In particular, some students holding F status have been unable to change to H-1 status prior to October 1, 2005, the start of the next fiscal year. As the F-1 status of many students will expire well before October 1, these students are faced with the prospect of going abroad until October 1, or be subject to various penalties for remaining in the United States without authorization.

The Department of Homeland Security has proposed a rule that, if published, would protect the status of F nonimmigrants whose status will expire, and who are applying for H visas which will become available October 1.

We have not yet seen the proposed rule, and can only speculate as to its contents. It is not clear if the rule will protect nonimmigrants other than those in F status, such as J-1 nonimmigrants. We will keep you apprised as new developments arise.

Availability of H Visas for Fiscal Year 2005

U.S. Citizenship & Immigration Services' Service Center Operations Director, Fujie Ohata, has announced that, as of the end of May, a total of approximately 16,100 H-1Bs countable against the fiscal 2005 cap have been either approved or remain pending out of the available 65,000. 5,000 of the remaining visas have been set aside for workers from Singapore and Chile.

Despite the current availability of visas for the next fiscal year, employers should still plan far ahead in hiring new employees pursuant to H-1B status. With such a limited number of visas available, the cap could be reached shortly after, or even prior to, October 1.

PERM Update

In our April newsletter, we informed you of a proposed regulation that, when published, will substantially alter the Labor Certification process. As of today, the Program Electronic Review Management System, or PERM, remains under review by the Office of Management and Budget (OMB). Projections as to when the rule will be published are speculative, and vary from as early as August to as late as December. The rule is expected to become effective 120 days after the date of its publication.

We will update you regarding significant PERM developments as they arise.

L-1 Legislation

In recent months, the L-1 nonimmigrant classification (intracompany transferee) has come under attack. Various bills are currently pending in Congress which would eliminate the L-1 classification, impose a numerical cap, impose a prevailing wage requirement, require Bachelor's degrees for L-1 nonimmigrants, eliminate the Blanket L program, and/or impose other modifications which could render the L-1 moot as a viable visa option for many companies. If your organization relies on the L-1 classification to bring valued employees to the United States, we strongly urge you to contact your Representatives and Senators. This may be done quickly and easily through the American Immigration Lawyers Association website's "Contact Congress" feature, accessible at

http://capwiz.com/aila2/mail/oneclick_compose/?alertid=3137656.

Thank you for your attention to this important issue.

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

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Notice Published to Protect the Status of Students in F and J Status Affected by the H-1B Cap

On Friday, July 23, 2004, the Department of Homeland Security published a notice in the Federal Register that extends the duration of status for foreign students in F and J status who are eligible to change status to H-1B, but whose status, including the grace period, expires before October 1. This notice will primarily affect students who have applied to change status to H-1B, but who are unable to do so prior to October 1, due to the FY2004 H-1B cap. The notice also affects students who have not yet had an H-1B petition filed on their behalf, but who have an employer willing to sponsor them and can have their petition filed with U.S. Citizenship & Immigration Services (USCIS) no later than July 30.

The notice does not address whether USCIS will reconsider change of status requests that have already been denied, but USCIS has informally indicated that it will allow employers to file new petitions or motions to reopen such cases under limited circumstances.

If you or your company would like to sponsor a worker for H-1B status who is currently employed pursuant to F or J optional practical training and whose status will expire prior to October 1, 2004, you must file an H-1B petition immediately to benefit from this provision.

If you or your company would like to sponsor for H-1B status an F or J student whose status will expire prior to October 1, or if you are unclear whether an H-1B beneficiary for FY2005 is affected by this notice, please contact Rosner & Associates as soon as possible.

New Photograph Instructions

USCIS announced today, July 26, that it will begin requiring passport-style photographs, rather then the old 3/4-view photographs, perhaps as soon as August 1. However, we have evidence that CIS may be applying these new requirements prematurely; we have already received requests from CIS for new photographs for applications already filed. If you are or an employee is engaged in compiling documentation, including photographs, to support an application yet to be filed with CIS, we suggest that you contact us to find out what type of photograph is required. For your reference, the new photograph instructions may be found at http://travel.state.gov/passport/pptphotos/index.html.

USCIS Extends VisaScreen Nonimmigrant Waiver

On July 22, 2004, the Department of Homeland Security published an interim rule amending the agency's regulations to extend the deadline by which certain allied health care workers from Canada and Mexico must obtain a health care worker certification (known as "VisaScreen"). Under Section 212(a)(5)(C) of the Immigration & Nationality Act, "an alien who seeks to enter the United States for the purpose of performing labor as a health care worker, other than a physician, is inadmissable unless the alien presents a certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS), or an equivalent independent credentialing organization, verifying that the alien meets certain education, training, licensure and competency requirements." This rule is independent of the licensing requirements of various U.S. jurisdictions.

The rule became effective on July 25, 2003 and provided for a one-year transition period. Under the transition period, eligible allied health care workers admitted to the United States before September 23, 2003 had until July 26, 2004 to obtain a VisaScreen certificate.

The July 22 rule extends until July 26, 2005 the deadline for certain allied health care workers to fulfill the VisaScreen requirement. It applies ONLY to Canadian and Mexican nationals seeking entry on a NEWLY-ISSUED TN visa. It does not apply to nationals of any other country, or Canadian or Mexican nationals seeking entry with another visa classification, nor does it apply to TN visa holders whose initial admission in TN status took place prior to September 23, 2003. PLEASE NOTE: All TN nonimmigrant allied health care workers who were initially admitted prior to September 23, 2003, MUST possess a valid VisaScreen certificate or they will be denied admission to the United States after foreign travel. All allied health care workers working in the U.S. pursuant to any other nonimmigrant classification will also be denied admission after July 26, 2004 unless they have obtained a VisaScreen certificate.

The seven occupations subject to the VisaScreen requirement include 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); and Physician Assistants.

For additional information on whether you or your employees are now subject to the VisaScreen requirement, please contact Rosner and Associates. For additional information on VisaScreen, see www.cgfns.org.

DOL Attempts to Reduce Backlogs for Pending Labor Certifications

The Department of Labor (DOL) has issued an interim final rule describing its plan to reduce the backlog of pending labor certification applications, to be effective August 20, 2004. The rule establishes centralized processing centers to help DOL Regional Offices and State Workforce Agencies (SWAs) shorten processing times and increase adjudication of pending labor certifications.

Under the interim rule, the National Certifying Officer has the discretion to direct SWAs and DOL Regional Offices to transfer pending labor certification applications to centralized processing centers for completion of processing. Criteria for selecting which applications should be transferred will be available at a later date.

The interim final rule has no bearing on the implementation of PERM, the proposed DOL regulation which is expected to alter the labor certification application process and the role of SWAs in that process. PERM is expected to be published by the end of August, with an effective date 120 days later, although it is still possible the rule will be delayed beyond that date. The recently published interim final rule focuses on reduction of the backlog of labor certification applications currently pending at SWAs and at the DOL Regional Offices.

The rule has been published in interim final form, and is thus subject to revision. The coming months will show whether the new system is effective in reducing existing backlogs.

DV 2005 Lottery Winners Selected

The Department of State announced last week that it has selected and notified the FY2005 Diversity Visa Lottery winners. The agency selected approximately 100,000 winners for 50,000 available visas, so if you or someone you know has won the lottery, you are strongly urged to submit your application to adjust status (or immigrant visa application overseas) as soon as possible after September 30, 2004.

For additional information on applying for adjustment or an immigrant visa pursuant to the diversity visa lottery program, please contact Rosner and Associates.

USCIS Plans to Implement InfoPass Nationwide by September 2004

USCIS has announced its intention to implement an Internet-based system that enables the public to schedule appointments online with USCIS immigration officers across the country. Implementation of this internet system, known as InfoPass, is intended to reduce the volume of lines and the duration of wait times at District Offices. Currently available only at District Offices in New York and Miami, InfoPass is accessed by visiting the USCIS website at http://uscis.gov <http://uscis.gov/> and following screen prompts. InfoPass generates an electronic appointment notice, enabling those in need of specific immigration information to obtain a date and time to speak with an immigration officer.

When implemented in its entirety, this system is expected to improve significantly the process of speaking with an immigration officer at a District Office. However, District Offices are largely unable to respond to case status inquiries for applications and petitions filed at USCIS Regional Service Centers. Due to the operation of the National Benefits Center, which began accepting all family-based cases earlier this year, the number of cases actually filed with District Offices is at an all time low. Consequently, while successful implementation of InfoPass will assist in obtaining general immigration information and in reducing wait times when it is necessary to speak with an immigration officer, it will not assist in obtaining reliable case status updates or tackling case-specific issues for the overwhelming majority of pending applications and petitions.

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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.

September 2004

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.

Rosner & Associates Implements Online Case Management System

Rosner & Associates, LLC, is pleased to announce the implementation of a new, online case management system. The new system has several features that should improve our clients' ability to access necessary documents and to keep abreast of developments in specific cases.

Although the system is fully operational, it will take several months for us to completely update the data fields and work out any kinks in the program. We are introducing the system to our clients on a case-by-case basis. We expect the fully integrated system will provide individual clients and corporate contacts with tools that will enhance the application process for all immigration-related applications and petitions.

If you are a primary corporate contact or individual client and you have not yet received your username and password, please contact Rosner & Associates and we will provide you with the necessary tools to log in to our system. All active clients will ultimately receive this information, as new cases are commenced and old applications and petitions are renewed.

We also realize that some of our clients may not be interested in using the system. If you prefer not to access case information online, we are happy to accommodate your preferences.

Labor Certification Will Not Be Implemented Before the End of the Year

Despite initial, optimistic predictions of Summer or Fall 2004 implementation, the new labor certification program, known as PERM (Program Electronic Review Management System), will not be implemented until 2005, at the earliest. The regulation remains under review at the Office of Management and Budget, where it has lingered since February 23, 2004. The regulation will take effect 120 days following OMB approval and publication.

As a reminder, the implementation of PERM will cause significant changes in the processing, and possibly the eligibility, of Labor Certification applicants. If you or a foreign employee plans to apply for labor certification in the future, now is the time to determine whether it is more advantageous to file before or after the implementation of PERM. Please contact Rosner & Associates for details.

H-1B Cap Will Soon Be Reached

U.S. Citizenship & Immigration Services (USCIS) has reported receiving 45,900 applications that will count against the FY 2005 cap of 65,000. The agency has indicated that the cap will be reached in "several weeks." The new fiscal year begins on October 1. Unless Congress raises the cap, this shortage will have the practical effect of making H-1B visas un available for new H-1B workers for almost the entire fiscal year, until October 1, 2005.

It is unlikely that Congress will consider legislation regarding the H-1B cap before the November election. However, we urge all of our clients who rely on H-1B visas for foreign national employees to communicate their concerns to Congress. The American Immigration Lawyers Association provides a quick and easy way to do so. To send a letter to Congress urging members to support increased visa availability of H-1B status for foreign professionals, go to: http://capwiz.com/aila2/mail/oneclick_compose/?alertid=5183421 and follow the appropriate links. You can also telephone your Members of Congress at 202-224-3121 in support of this important issue.

Reminders for Companies Seeking to Procure Visitors' Visas for Foreign Business Invitees

As all of our clients are aware, in the wake of 9/11, U.S. consuls have employed increasing scrutiny in the review of visa applications at U.S. consulates worldwide. Visitor visas in particular have borne the brunt of heightened security measures and an environment of "zero tolerance." The reality that obtaining visas no longer resembles a streamlined process is worth repeating and certainly should not be far from one's mind when organizing seminars, conferences and training programs that anticipate international invitees. In our experience, applicants from China, India, West Africa, Mexico, the Philippines and some parts of Latin America have been subject to the longest wait times and some of the most inflexible procedures for visa issuance. (The Visa Waiver program still allows applicants from many countries to enter the United States without first obtaining visitor visas.)

One of the most significant changes in recent years has been the requirement that all visa applicants be interviewed. The wait time for interview appointments is frequently so lengthy that applicants are well advised to contact the consulate to schedule an appointment several months in advance of anticipated travel. Expediting scheduled appointments is difficult, and in some cases, impossible. Moreover, at certain consulates, the effort itself might prejudice the application.

Many consulates no longer issue visas the

same day as the appointment. Although the waiting period to have a passport and visa returned is generally not long, applicants should not rely on last minute appointments to adequately accommodate travel plans.

All of this is to revive the old adage that preparation is everything. In the case of visitor visa applications, this means providing as much lead time as possible in terms of seminar scheduling and distribution of invitations. It also means that invitees should schedule their visa appointments immediately upon receiving the invitation.

Since 9/11, the Department of State has demonstrated that accommodating international commerce will take a back seat to the slow moving wheels of bureaucracy in every case. Do not make the mistake of thinking that these problems will not arise when the corporate host is a well-known, multi-billion dollar company. Experience has taught us that the consular process will be slow, suspicious and inflexible. Our only defense is preparation.

New Online Appointment System Implemented at USCIS Offices Nationwide

InfoPass, the internet-based system that enables the public to schedule appointments online with USCIS information officers, is now operational in all USCIS District offices. Accordingly, if you or your foreign employee needs to visit a USCIS local office to obtain an Employment Authorization Document, to receive a passport stamp, or speak with an immigration officer, it is now possible to avoid a lengthy wait by making an appointment online. In fact, we have heard that some USCIS offices may not allow you to conduct business there unless you have made an appointment in advance using InfoPass. You can learn more about InfoPass and make appointments at http://infopass.uscis.gov/. Please note that InfoPass does not override the existing system for interview appointments with USCIS adjudicating officers, at least at this time.

Firm News

We are pleased to announce that one of our partners, Brad Ortman, has been appointed to the Board of the American Civil Liberties Union of Ohio.

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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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.

DV-2006 VISA Lottery Application Period Opens

On November 5, 2004, the U.S. Department of State opened a two month application period for the Fiscal Year 2006 green card lottery. This is an opportunity for you or your foreign national employees to win green cards for self and dependent family. The program is known as "DV-2006." This year marks the second year that electronic registration is required. Paper entries and mail-in requests for registration are not accepted. This program makes available 50,000 diversity immigrant visas each year via a random selection process intended to benefit natives of "low admission" countries, as defined by U.S. Citizenship and Immigration Services ("USCIS") (formerly known as INS).

To be eligible, the applicant must NOT be a native of any of the following "high-admission" nations: Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Russia, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. (Nativity in most cases is determined by country of birth, not necessarily country of current citizenship.) In other words, natives of these countries are not eligible to enter the lottery. Natives of all other countries are eligible, as are natives of Hong Kong, Macau, Taiwan and Northern Ireland, provided they meet certain employment and education requirements. Specifically, the applicant must have EITHER a high school education or its equivalent, OR two years of work experience within the past five years in an occupation that requires two years of experience or training. Persons born in an ineligible country may apply if their spouse was born in an eligible country. The enclosure describes in detail these eligibility requirements.

The application process is easy and something that anyone should be able to complete without assistance from an immigration lawyer or immigration consultant. Use of a lawyer or consultant will not improve the chances of being selected. No application fee is required. The applicant must complete the Electronic Diversity Visa Entry Form, which is accessible only at http://www.dvlottery.state.gov. The form must be completed in its entirety and submitted electronically during the registration period, which began at noon EST (GMT-5) on Friday, November 5, 2004 and will end at noon EST (GMT-5) on Friday, January 7, 2005. PAPER ENTRIES WILL NOT BE ACCEPTED. The Department of State will send entrants an electronic confirmation notice upon receipt of completed entry form.

The applications must include digital photographs which must satisfy specific requirements. Photographs of the applicant and the applicant's spouse, all natural children, as well as all legally-adopted children and stepchildren, who are unmarried and under the age of 21, must be included with the entry form.

In addition, although each spouse may submit an application without penalty, duplicate or multiple applications submitted by any one individual will result in disqualification. Since the selection process is random, all applications received during this period will have an equal chance of being selected. All selected applicants will be chosen and notified by mail. All notification letters will be sent within about nine months of the end of the application period to the address indicated on the entry. Non-winners will not be notified.

In the past some winners of the lottery have been found ineligible for green cards. Other winners have failed to respond. To insure an adequate pool of winners to award 50,000 green cards, far more than 50,000 applicants will be selected. Thus, anyone selected in the lottery should comply with the instructions contained in the notification letter to pursue his or her green card application as soon as possible after October 1, 2005 and no later than September 30, 2006. Failure to do so will result in ineligibility to immigrate based on the DV-2006 lottery.

It is a relative long-shot that any particular application will be selected. However, we strongly recommend that all individuals falling within the above-mentioned criteria who are considering permanent immigration to the United States take advantage of the DV-2006 lottery due to its ease and lack of expense. Individuals may wish to enter the lottery even if they have an immigrant petition already pending.

Detailed instructions and photo specifications are available at http://www.dvlottery. state.gov. Please feel free to contact Rosner & Associates for assistance or additional information regarding participation in this year's diversity visa lottery program.

I-9 Electronic Storage Bill Signed into Law

On October 30, 2004, President Bush signed into law H.R. 4306 (P.L. 108-390), which allows employers to electronically complete and store employment eligibility verification. The law, which amends Section 274A(b) of the Immigration and Nationality Act, includes a provision permitting the use of handwritten or electronic signatures in completing I-9 forms, in addition to its provision

permitting electronic storage. The law will take effect 180 days after October 30 (April 28, 2005) or upon the effective date of the final rule implementing the law, whichever is earlier.

Once effective, the new law will assist employers in reducing the rather cumbersome paper retention requirements previously mandated under Section 274A(b). As employers are aware, Forms I-9 are not filed with the U.S. government, but are retained by the employer, which must maintain them in its own files for three years after the date of hire or one year after the date of termination, whichever is later. With the implementation of P.L. 108-390, employers will be able to maintain I-9 records in electronic files, rather than in space-consuming paper files.

Auditing requirements remain the same under the new law. Upon request, all Forms I-9 subject to the retention requirement must be made available in their original form or on microfiche to an authorized official of DHS. Additionally, documentation requirements necessary to comply with Section 274A(b) are not altered by the new law. This means that employers are still required to review original documents before electronically signing Form I-9.

We will advise you when we have additional information concerning implementation of the new law. If you have any questions concerning the new law or Form I-9 requirements in general, please contact Rosner & Associates or the Office of Business Liaison at Citizenship & Immigration Services http://uscis.gov/graphics/services/employerinfo/oblhome.htm.

IRS Advice on Dealing with SSN Delays

The Internal Revenue Service has posted on its website a statement on how employers can deal with the delays in obtaining Social Security Numbers for new foreign national employees. As many of you know from personal experience, since September 30, 2002, the Social Security Administration will not issue SSNs to foreign nationals until it has verified the individual's immigration status with CIS. Due in large part to a lack of staff to handle this task at CIS local offices, the verification can take a month or more. IRS states that it will not issue an Individual Taxpayer Identification Number to foreign nationals who are waiting for SSNs, but that it will be "quite favorable" in not assessing penalties associated with an employer's failure to provide a payee TIN when required. IRS states that employers who are faced with this situation should retain documentation to show that failure to provide a TIN for a particular employee is caused solely by SSA delays in issuing a Social Security Number to the employee.

The IRS statement may be found online at http://www.irs.gov/businesses/small/international/article/0,,id=129227,00.html.

US-Visit Expands to 50 Busiest Land Ports of Entry

The Department of Homeland Security (DHS) has recently announced its plan to begin implementation of US-VISIT, the United States Visitor and Immigrant Status Indicator Technology Program, at the 50 busiest land Ports of Entry (POEs) by December 31, 2004 or earlier. As we have reported previously in this newsletter, US-VISIT is an integrated, automated entry-exit system that records the arrival and departure of foreign nationals, verifies the identity of foreign nationals, and authenticates travel documents through comparison of biometric identifiers.

The POEs and the anticipated dates of implementation are as follows:

Estimated start date of November 15, 2004

- Port Huron POE, Blue Water Bridge, Highway 69 and International Border, Port Huron, MI
- Douglas POE, Rte 191 and International Border, Douglas, AZ
- Lincoln-Juarez Bridge POE, Laredo, TX
- Gateway to the Americas International Bridge POE, Laredo, TX
- Columbia Solidarity Bridge POE, Laredo, TX
- World Trade Bridge POE, Laredo, TX

Estimated start date of December 6, 2004

- Niagara Falls POE (to include Lewiston-Queenstown, Whirlpool, and Rainbow Bridges), Niagara Falls, NY
- Peace Bridge POE, Moore Drive and International Border, Buffalo, NY
- Detroit Ambassador Bridge POE, Detroit, MI
- Detroit-Windsor Tunnel POE, Detroit, MI
- Lukeville POE, Highway 85 & International Border, Lukeville, AZ
- Nogales East (Deconcini POE), Nogales, AZ
- Nogales West (Mariposa POE), Nogales, AZ
- San Luis POE, Highway 95 & International Border, San Luis, AZ
- Andrade POE, Andrade, CA
- Calexico East-Imperial Valley POE, Rte 111 and International Border, Calexico, CA
- Calexico West POE, Rte 111 and International Border, Calexico, CA

Estimated start date of December 13, 2004

- Fabens POE 18051, Island Guadalupe, Fabens, TX
- Presidio POE, Border Station Highway 67, Presidio, TX 79845 Santa Teresa POE, Santa Teresa, NM
- Otay Mesa POE, 9777 Via De La Amistad, San Diego, CA
- San Ysidro POE, Highway 5 and International Border, San Diego, CA
- Tecate POE, Hwy 188 and International Border, Tecate, CA
- Blaine-Pacific Highway POE, Rte. 543 and International Border, Blaine, WA
- Blaine-Peace Arch POE, Interstate 5 and International Border, Blaine, WA
- Lynden POE, Rte. 539 and International Border, Lynden, WA
- Point Roberts POE, Tyee Drive and Roosevelt Way, Point Roberts, WA
- Sumas POE, Cherry Street and International Avenue, Sumas, WA

Estimated start date of December 20, 2004

- Champlain POE, Highway 87 and International Border, Champlain, NY
- Massena POE, Rte. 45 and International Border, Rooseveltown, NY
- Thousand Islands POE, Highway 81 and International Border, Alexandria Bay, NY
- Sault Ste. Marie POE, The International Bridge, Highway 75 and International Border, Sault Ste. Marie, MI
- Bridge of the Americas POE, El Paso, TX
- Paso del Norte Bridge POE, El Paso, TX
- Ysleta POE, Ysleta-Zaragoza Bridge, El Paso, TX
- Derby Line POE, Highway 91 and International Border, Derby Line, VT
- Calais--Ferry Point POE, Main Street and

International Border, Calais, ME

- International Falls POE, Rte 53 and International Border, International Falls, MN

Estimated start date of December 27, 2004

- Gateway International Bridge POE, Brownsville, TX
- Brownsville/Matamoros Bridge POE, Brownsville, TX
- Hidalgo POE, McAllen-Hidalgo-Reynosa International Bridge, McAllen, TX
- Los Indios POE, Free Trade Bridge at Los Indios, Los Indios, TX
- Los Tomates/Veterans International Bridge POE, Brownsville, TX
- Pharr POE, Pharr-Reynosa International Bridge, Pharr, TX
- Progreso POE, Progreso/Nuevo Progreso International Bridge, Progreso, TX
- Rio Grande City POE, Starr-Camargo Bridge, Rio Grande City, TX
- Roma POE, Roma-Ciudad Miguel Aleman Bridge, Highway 83 and International Border, Roma, TX
- Del Rio POE, Del Rio/Ciudad Acuna International Bridge, Garfield Ave & Intl Border, Del Rio, TX
- Eagle Pass Bridge I POE, Eagle Pass/ Piedras Negras Bridge, Highway 57 & Intl Border, Eagle Pass, TX
- Eagle Pass Bridge II POE, Camino Real International Bridge, Highway 57 & Intl Border, Eagle Pass, TX

The dates listed above are estimates; however, all of the above POEs will implement US-VISIT no later than December 31, 2004. At the present time, Canadian citizens are still not subject to US-VISIT unless they are entering the U.S. pursuant to a visa stamp in their passports, but this is subject to change at any time. Children under 14 and adults over 79 are also not subject to the US-VISIT biometric requirements. For additional information, please contact us or consult the US-VISIT website at www.dhs.gov/us-visit.

Smiling Permitted, No Teeth

Our office recently came face-to-face with a little-known aspect of CIS' new photograph requirements. As we have reported previously, CIS changed its photograph requirements several months ago from ≤-face photographs to the full-face, passport-style photographs which have been required by the U.S. Department of State. The State Department requires a "natural expression" on its photographs, and CIS has followed suit. Buried within the State Department's photography guide is a definition of "natural expression," which reads: "The subject's expression which should be neutral (non-smiling) with both eyes open, and mouth closed. A smile with closed jaw is allowed but is not preferred." On the back of the photo instructions it distributes to the public, CIS has interpreted this definition to mean: "No expression. Smiling permitted (no teeth). No squinting or anything else that would distort features." Earlier this week, some of our clients were instructed by CIS' Cleveland District Office to retake photos which featured toothy grins. We do not know whether this is a nationwide policy, as we have not yet had any photos rejected for similar reasons by any of the Service Centers. To be on the safe side, however, we will be advising all of our clients to hide their pearly whites.

Fiscal 2005 Omnibus Bill: Proposed Changes to H & L VISAs

Congress passed an omnibus bill over the weekend which is pending the signature of President Bush to become law. H.R. 4818 includes $388 billion in spending appropriations and two reform Acts that propose significant changes to the H and L visas, respectively. Because of an objectionable provision that allows the House and Senate Chairs of the Appropriations Committee access to individual tax returns, the bill will not be forwarded to the President for signature until the House passes a measure repealing the provision. However, the House is expected to take this action as soon as tomorrow and the President has indicated that he will sign the Bill. In the meantime it is expedient to be aware of the proposed changes to the two visa categories, as it is likely that the Bill will be enacted without changes in these subtitles.

In connection with the H visa category, the Bill includes provisions that, when enacted, will affect the number of visas available, the amount of filing fees, prevailing wage, audits, and record keeping and reports. In its only unquestionably favorable section for foreign workers, the Bill raises the H-1B visa cap by an additional 20,000 spaces, reserved for foreign workers with Master's degrees or higher.

On a less advantageous note, and effective upon enactment of the Bill, a $500 fraud fee will be added to the $185 H-1B filing fee, making the total fee equal to $685. In addition, the Bill removes the sunset provision on the additional fees levied against employers for certain H-1B petitions and raises the amount of that fee from $1,000 to $1,500. However, employers who employ 25 or less employees in the U.S. will only be responsible for a $750 employer filing fee. In the case of an employer with 26 or more employees, the total H-1B filing fees will equal $2,185, unless the employer is filing an extension for an employee that the employer has already petitioned for, in which case the total fee will be $685. Keep in mind that this does not include the $1,000 fee for premium processing. If an employer with over 25 workers chooses to premium process a petition for a new or portable H-1B worker, the total filing fee will be $3,180.

The Bill also changes prevailing wage requirements, eliminating the ability of employers to offer salaries within 95% of the prevailing wage. Consequently, under the new provisions, 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. The Bill attempts to mitigate the harshness of this provision by mandating that government surveys provide four levels of wages commensurate with experience, education and level of supervision. The section also provides a formula for calculating intermediate wage requirements where a two level survey is used.

Lastly, the Bill includes provisions designed to compel statistical record keeping and annual reports by the Department of Homeland Security, the Department of State and the Department of Labor. For example, the Bill requires the Department of Labor to report on the investigations undertaken in response to reports of willful violation of one or more of the attestations provided on the Labor Condition Application, a requirement that suggests at least the possibility that investigations will be increased based on the reporting mandate.

Unless otherwise provided, the H-1B subtitle will take effect 90 days after the date of the Omnibus Bill's enactment. The provisions relating to the $1,500 employer fee and the $500 fraud filing fee will become effective upon enactment of the bill, which could occur as early as tomorrow.

The Bill also proposes changes to the L visa category, including the filing fee, the length of employment abroad for Blanket L applicants, and the creation of record keeping and reporting functions within the Department of Homeland Security and the Department of State. Like H visa petitions, petitions in the L category will require payment of a $500 fraud fee, raising the filing fee for petitions for L status to $685. Please note that this fee increase also applies to beneficiaries who apply under a Blanket petition.

Additionally, the Bill changes the provision permitting only six months of employment with a foreign affiliate, subsidiary or parent company abroad for L-1 Blanket petitions. Effective upon enactment of the Bill, the beneficiary will be required to have been employed by the foreign company for at least one year prior to the filing of an application to work in the United States pursuant to L-1 status. This modification applies only to petitions for initial classification. Consequently, foreign workers currently in the United States pursuant to L-1 status who do not meet the one year requirement are not affected by the provision.

In addition, like the H visa reforms, the L visa provisions provide for heightened monitoring of L visa recipients and potential and actual abuses of the status. Specifically, the Bill calls for an Inspector General Report on the L visa program and establishes a task force to report to the House and Senate Judiciary Committees on the implementation of the Inspector General's recommendations, as set forth in the report.

As a reminder, the proposed changes to the H and L visa categories are not yet law. We will notify you as soon as we have information that President Bush has signed the bill and will advise you of what changes, if any, apply to the H and L subtitles. We will also, of course, advise you as to the soonest possible date new H-1B positions may be filed.

Arlington, VA Office to Relocate

U.S. Citizenship & Immigration Services announced yesterday that the Washington D.C. District Office, currently located in Arlington, Virginia, will move to a Fairfax, Virginia office, to open Tuesday, November 30.The new Washington D.C. District Office, which will be located at 2675 Prosperity Drive, will replace the existing Fairfax office on North Fairfax Drive. The Washington District office continues to have jurisdiction over the entire state of Virginia, in addition to the District of Columbia. As a reminder, any visits to the Fairfax office must be made pursuant to an online, InfoPass appointment.

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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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