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.

May 2005

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.

The immigration law landscape continues to shift dramatically.

Over the last several months there have been major changes affecting common visa categories (H-1B, L-1), the labor certification process, and new standards for asylum and driver's licenses. It's been a busy time here at Rosner & Associates as we have worked to understand these developments and advise clients how these changes affect their particular circumstances. This newsletter summarizes some of the more significant developments of the past few months.

PERM Labor Certification Process is Finally Here!

The new PERM labor certification system became effective on March 28, 2005 and is to be used for all labor certifications filed after that date. PERM changes quite a few of the previous requirements, but the biggest changes are in processing and recruitment. Those who have filed applications already have revealed quite a few bugs in the new system, but the Department of Labor (DOL) is reportedly working on correcting these flaws.

Processing

Under the PERM system, employers may file an application electronically or by mail. Electronic applications are greatly preferred. Employers must create a PERM account on DOL website, and then must create a sub-account for each attorney which is filing labor certification applications on its behalf. This is a fairly user-friendly system. Although no real problems have been reported with the registration process, delays of one week or more in receiving DOL confirmation of a new account are now routine. For applications not selected for audit, DOL has stated an anticipated processing time of 45-60 days.

Recruitment

Recruitment under PERM is similar to the old RIR procedures. Recruitment must be conducted within the six months prior to filing of the application. In general, the following recruitment must be done: Two Sunday ads in the major metropolitan newspaper for the area of intended employment (an ad in a professional journal may be substituted for one of the Sunday ads) and placement of a 30-day job order with the State Workforce Agency (SWA). A posting of the job opportunity at the worksite for 10 consecutive business days is still required, as well as posting of the job opportunity on the employer's intranet, or other method the company uses to notify its employees of job opportunities. This requirement has caused great concern among many of our clients; nevertheless, it is one which cannot be avoided.

For professional positions, including IT professionals, accountants, engineers, lawyers, etc., three additional recruitment steps are required. The regulations provide 10 alternatives to choose from, including

1. a job search web site, such as monster.com or a newspaper's job site;
2. the employer's web site;
3. a local or ethnic newspaper;
4. job fairs;
5. private employment firms;
6. radio or TV ads;
7. a trade or professional organization;
8. on-campus recruiting;
9. an employee referral program (if such program offers incentives); and
10. campus placement offices.

Employers must choose three different recruitment sources; three uses of the same source are not acceptable.

Prevailing wage determinations

In order to file a labor certification application under PERM, the employer must request a prevailing wage determination from the SWA. This is required even if the employer will use a published or private wage survey. The SWA must approve the use of a survey and provide a written determination of the prevailing wage.

Audits

In another significant change from the previous procedures, supporting documentation is no longer submitted with the labor certification application. All documentation, including resumes, must be retained by the employer for five years in case of an audit by the DOL. Certifying Officers may request an audit of a labor certification either for cause or through random selection procedures. Applications selected for audit will receive a written request from the DOL requiring the submission of additional documentation. Employers will have thirty days to respond. It is important to note that a failure to respond will result in the denial of the application and could, in the discretion of the Certifying Officer, result in a requirement for the employer to engage in DOL-supervised recruitment for all labor certification applications for a two year period. No estimated processing time for audited applications has been provided.

Please note that the new regulations give the Certifying Officer the authority to revoke a previously approved labor certification application at any time, if the CO determines that the approval of the labor certification was not justified due to fraud, willful misrepresentation, obvious errors, or other reasons. The regulations also give the Department of Homeland Security and the Department of State authority to invalidate a labor certification

at any time, if DHS or DOS determines that the application involved fraud or willful misrepresentation of a material fact.

Refiling Pending Applications Under the PERM System

Employers may refile pending labor certification applications under PERM while maintaining the original filing date by withdrawing the pending application and meeting the following conditions: comply with PERM regulations (including recruitment), the new application must be identical to the original application, and a job order must not have been placed for the original application. DOL may find the original and new applications identical if the employer, employer address, alien, job title, job location, job requirements, and job description are identical. The salary/prevailing wage need not be identical. If the request is denied, the application will be considered newly filed, and the applicant will lose the previous priority date.

Applications filed under the old system will continue to be processed at regional offices and backlog reduction centers.

Due to the fact that the new PERM system is in large part automated and has not shown itself to work terribly well, we are advising our clients to postpone filing of labor certification application where it is possible to do so. We hope that within the next few months the DOL will have worked out some of the bugs, and that we will have additional information which will enable us to navigate the system more effectively.

Four Level System Implemented for Prevailing Wages

A four-level system has replaced the old two-level system used to determine prevailing wages for H-1B petitions and labor certification applications. These four skill levels are based upon experience, education and level of supervision the job requires. Prevailing wage determinations will continue to be made by State Workforce Agencies. Prevailing wage determinations are valid for H-1B petitions and/or labor certification applications no less than ninety days and no more than one year. If an employer disagrees with a prevailing wage determination, it may file a new request, file supplemental information, or appeal the determination.

H-1B Update

Effective March 8, 2005, Congress authorized 20,000 new H-1B visas limited to applicants with US-issued Master's and higher degrees. After much confusion and delay, on May 5, 2005, DHS finally published regulations which authorize filing of petitions for these visas. These regulations were effective immediately, but petitions may not be filed (received) until May 12, 2005.

FY2005 H-1B visas available under this provision must be filed with the Vermont Service Center. Electronic filing of ALL H-1B petitions has been suspended until further notice. The regulation provides procedures for upgrading a previously filed or approved FY2006 H-1B (effective 10/1/2005) to a FY2005 H-1B with an earlier start date.

We believe that we have identified all H-1B petitions in our office which could qualify for an upgrade. However, if you or one of your employees has a pending or approved FY2006 H-1B petition that may be eligible for upgrade which we have not discussed with you, please contact us immediately. Due to expected high demand for these visas, we expect that the limit will be reached very quickly, and perhaps as early as May 12 or 13.

Electronic Storage of Forms I-9 is Now Permitted

On October 30, 2004, the President signed into law legislation authorizing employers to retain Forms I-9 in electronic format, and authorizes attestations on the Form I-9 to be manifested by electronic signature. The legislation was to become effective on April 28, 2005, or the effective date of implementing regulations, whichever occurred first. No regulations have been implemented, so the law became effective on April 28, 2005.

Under the law, employers may continue to maintain Form I-9 records in paper, microfilm, or microfiche. They may also maintain records electronically, either in addition to or in lieu of the other methods. U.S. Immigration and Customs Enforcement has offered some preliminary guidance which employers may find helpful until regulations are issued (http://www.ice.gov/graphics/news/factsheets/i-9employment.htm).

The ICE guidance refers employers to Internal Revenue Service standards regarding electronic records, which may be helpful. (IRS Revenue Procedure 97-22)

It may be advisable to wait until DHS issues regulations before implementing a corporate policy on electronic recordkeeping of Forms I-9. If you wish to implement such a policy in the absence of regulations, however, please consult the IRS standards and do not hesitate to contact us for additional information and guidance.

Possible EB-3 Backlog Reduction

As many of you know, there is currently a backlog in the employment-based third preference immigrant visa classification (skilled and professional workers, known as "EB-3") for nationals of India, China and the Philippines. Pending in Congress is legislation which could allow for the recapture of EB-3 (employment-based, third preference) immigrant visas for Schedule A occupations, most notably registered nurses.

Under current law, there is a quota imposed each fiscal year on the number of persons from each country who may immigrate to the U.S. in each immigrant visa classification. At the end of the fiscal year, those numbers which are not used are lost. This legislation would allow for the recapture of unused numbers in the EB-3 visa classification for the last three years, but would limit them to occupations listed in Schedule A of DOL regulations, which are recognized as shortage occupations. Schedule A includes registered nurses and physical therapists. The number of visas which can be recaptured is not to exceed 50,000.

The legislation would also allow recapture of visas in future years, but would not limit them to Schedule A occupations.

This legislation is part of an Emergency Supplemental Appropriations bill (H.R. 1268) which includes funds for military operations, the "War on Terror" and tsunami relief. It has cleared both Houses of Congress and is expected to be signed by the President very soon. We will provide additional information as it becomes available.

Possible New E-3 Visas for Australian Nationals

H.R. 1268 also creates a new visa classification for Australian nationals. The bill will add 10,500 new "E-3" visas for Australians seeking to work in the U.S. in a specialty occupation. The legislation appears to be very similar to the recently created H-1B1 classification for Chilean and Singaporean nationals. We will provide additional information as it becomes available.

REAL ID Act

Also included in H.R. 1268 is the REAL ID Act, which will change significantly the way driver's licenses are issued in the United States. In a purported response to terrorism, the REAL ID Act goes beyond the recommendations of the 9/11 Commission and creates national standards for the issuance of driver's licenses. Applicants for driver's licenses will be required to demonstrate that they are citizens of the U.S. or that they otherwise have lawful immigrant or nonimmigrant status in the U.S., using no less than four forms of identification. State agencies may not accept any foreign document other than a passport to verify identity, effectively rendering issuance of a license impossible for many lawful immigrants.

Nonimmigrants who apply for driver's licenses will only receive such licenses for the period of their authorized stay. State driver's license agencies will be required to verify with the issuing agencies the issuance, validity, and completeness of each document that is required to be presented, effectively turning them into immigration enforcement agencies and potentially causing significant delays in the issuance of licenses.

States which fail to comply with these requirements must print their licenses with unique designs or color backgrounds and clearly state that the licenses may not be accepted by federal agencies to verify identity.

The REAL ID Act also changes existing law in the following additional ways:

- It makes it more difficult to qualify for political asylum in the United States, toughening the evidentiary standards.
- It forecloses most avenues of judicial review for removal orders, particularly those that involve a petition for writ of habeas corpus.
- It expands the definition of "terrorist organization" and "engage in terrorist activity"

Finally, the REAL ID Act allows the Secretary of Homeland Security, in his sole discretion, to waive all legal requirements he deems necessary to expedite construction of security fences and barriers at the borders. This could include worker safety, compensation, zoning, and potentially (in an ironic twist) laws concerning employment of undocumented workers.

For additional information on the REAL ID Act and how it might affect you and your employees, please contact us.

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

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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In this issue

H-1B Update – Cap Likely to be Reached Soon

The annual H-1B quota for FY 2006 is expected to be filled within the next few months, and perhaps as early as October 1. As of August 4, 2005, approximately 52,000 H-1B cases subject to cap for FY 2006 were approved or pending, leaving approximately 6,000 of these H-1B visas available for the balance of the fiscal year. Any H-1B petitions subject to the cap for FY 2006 should be filed as soon as possible. Please contact us as soon as possible if you have an employee who will require a new H-1B visa in 2006.

There is somewhat less urgency for H-1B applicants with a Master's degree from a U.S. institution. As you may recall, Congress exempted from the H-1B cap 20,000 visas each fiscal year for individuals who earned at least a Master's degree in the United States. Just under 10,000 H-1B visas remain available for FY 2005 for foreign nationals holding U.S. earned Master's degrees, and nearly 12,000 H-1B visas are left for these individuals for FY2006.

Cap-Gap Regulation Unlikely

In years past, U.S. Citizenship & Immigration Services (CIS) has allowed F-1 students waiting for the start of H-1B status to remain in the United States during the period between the conclusion of their 60 day grace period, and the beginning of H-1B status valid with the start of the next fiscal year. CIS has not issued a regulation for FY 2005 permitting F-1 students to remain in the U.S. during this "cap gap," and has indicated informally that such a regulation is unlikely. If any of your employees are facing a cap gap, please contact us for additional information.

PERM Update

The long-awaited PERM labor certification process was finally implemented on March 28, 2005. The U.S Department of Labor has been struggling with its new electronic filing system, and the five months following its rollout were fraught with software glitches, thousands of erroneous denials, and frustrated employers, applicants and lawyers. Although the system continues to be a work in progress, by many accounts it is now operating more smoothly. We are now seeing many applications successfully adjudicated within a matter of weeks, although others do continue to languish. Employers report that the registration process is generally easy and fast. Unfortunately, we still await either anecdotal or definitive evidence concerning audits, particularly audit processing times. To our knowledge, not a single application has made it to final adjudication after an audit.

It remains to be seen how PERM will work long term, but thus far the new system shows some promise for drastically reducing labor certification processing time. We will provide you with additional information as we become more familiar with the process, and as we hear of the experience of others.

DOL Backlog Update

All labor certification applications filed prior to March 28, 2005 have now been sent to one of the Backlog Processing Centers (BPCs) in either Dallas or Philadelphia. As you may know, DOL has indicated that it will be sending "Selection of Continuation Option" letters (known as "45 day letters") for each application, requesting confirmation from employers that they wish to proceed with processing. We have received 45 day letters from the BPCs for somewhat less than half of the applications we have filed, some of which have been pending since 2002. Eventually, we should receive 45-day letters for all of these applications. DOL's stated goal is to have all letters sent out by the end of the FY2005.

DOL claims to be adjudicating these applications on a first-in, first-out basis in two tracks – standard labor certification, and Reduction in Recruitment. To date, very, very few of these applications have been adjudicated, ostensibly because DOL is focusing on entering data about cases and issuing 45 day letters.

DOL has refused to issue projected processing times for applications at the BPCs, other than to say it expects to have all applications adjudicated within 28 to 30 months of March 28, 2005, at which time the BPCs are expected to be closed. We will keep you apprised of developments regarding backlogged applications.

Changes Occurring in Final Issuance of Green Cards

Recently, there has been some confusion regarding the issuance of I-485 approval notices and the procedures foreign nationals must follow to receive their Permanent Resident Cards ("green cards"). In recent months, CIS modified how it completes the card manufacturing process. According to CIS, all applications should fall into one of the following three

categories:

1. Data needed to manufacture the card is captured from the I-485 application, and the card is mailed at roughly the same time as approval notice.
2. Data needed to manufacture the card must be obtained from the applicant, and such data is obtained through a visit to the local Application Support Center for biometrics processing roughly 6 weeks after approval of the I-485. The appointment notices look very much like fingerprint notices, but have a "Code 2" indicated on the notice. Children under 14 are also being scheduled for biometrics processing.
3. As with previous procedures, the applicant is instructed on the I-485 approval notice to make an InfoPass appointment at the local CIS office for final processing.

CIS has indicated that its goal is to have all adjustment applicants processed under the first process. However, as the agency phases in this procedure, uncertainty and inconsistency remain. We understand that generally, the older the application, the more likely it will encounter either process 2 or 3 above.

Of more concern to most applicants is an accompanying change in the green card approval process. Previously, upon approval of the I-485, the applicant would visit the local CIS office to complete processing, and at the same time, would obtain a stamp in his or her passport which served as temporary evidence of permanent residence. CIS will no longer provide that stamp, due to the fact that green cards are being manufactured within a matter of weeks, rather than months. However, CIS does recognize that some applicants do sometimes have a need to travel abroad between approval of the application and receipt of the card. If one of your employees does have such a need for travel, they must make an InfoPass appointment at the local CIS office, and take to the office a valid passport, the original I-485 approval notice, and proof of international travel within the next few weeks, such as a plane ticket. CIS will issue a stamp valid for 90 days unless the CIS computer system shows that the green card has already been made. In that situation, the individual may not leave the U.S. until after he or she has received the Permanent Resident Card.

If one of your employees faces this travel dilemma, please contact us for current information on CIS procedures.

Immigrant Visa Quotas

As you may know, the third preference employment-based immigrant classification (skilled workers and professionals, known as "EB3") continues to be unavailable for all nationalities. We expect that visas will become available for most nationalities for FY2006, if not sooner. Backlogs will likely remain, however, for nationals of China (mainland-born), India and the Philippines for the foreseeable future.

The Department of State has indicated that it expects a backlog to develop in the second employment-based immigrant classification (individuals with advanced degrees), possible as early as September 1, 2005. We expect that only nationals of China (mainland-born) and India will be affected, but this remains to be seen.

We will keep you advised of developments on this issue. In the meantime, if one of your employees may be subject to the EB2 backlog, please let us know as soon as possible so that we may consider available options.

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Our thoughts are with our clients, their families and friends who have been affected by the devastation brought by Hurricane Katrina and its aftermath.

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In this issue

Immigration Issues Related to Hurricane Katrina

I-9 Documentation for Hurricane Victims

On September 6, 2005, the Department of Homeland Security issued a press release stating that they will not initiate employer sanction enforcement actions for the next 45 days for civil violations under Section 274A of the Immigration and Nationality Act for individuals who are currently unable to provide identity and eligibility documents due to Hurricane Katrina. Employers should complete the Form I-9 as completely as possible, but note in the I-9 file that required documentation is not available due to the hurricane. DHS will review this policy at the end of 45 days.

New Orleans Office of USCIS

US Citizenship and Immigration Services has announced that it is temporarily relocating its New Orleans District office to the Memphis, Tennessee sub-office. All files in New Orleans are reportedly undamaged, and will be transported to Memphis. The New Orleans office will remain closed until further notice. Individuals affected by Hurricane Katrina who require assistance from USCIS may go to any USCIS District Office. For additional information, please contact us or go to http://uscis.gov.

New Orleans Passport Agency Closed

The Department of State has announced that the New Orleans Passport Agency is closed until further notice. US citizens in the following states submit their passport applications to the New Orleans Passport Agency for processing: Alabama, Arkansas, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Ohio, Tennessee, Virginia (except DC suburbs), Wisconsin and the Commonwealth of Puerto Rico. If you applied for a U.S. passport from any of these states BEFORE August 25, 2005 AND are traveling within the next 6 weeks, the Department of State is instructing you to contact the National Passport Information Center (NPIC) at 1-877-487-2778 (TTD/TTY 1-888-874-7793) for specific information on how to proceed.

The Department of State reports that all materials, including personal documents and applications, have been removed from the New Orleans Passport Agency and are on their way to another location.

If you applied for a U.S. passport from any of the affected areas AFTER August 25, 2005, your passport application will be re-routed to another Passport Agency for issuance.

No existing or new appointments with the New Orleans Passport Agency are being honored. If you need to travel urgently, you should make an appointment to appear at one of the agencies listed at the following link: http://travel.state.gov/passport/about/agencies/agencies_913.html

Immigrant Visa Quotas – Bad News and More Bad News

Last month in this newsletter, we advised you that we expected that visas in the third preference employment-based immigrant classification (skilled workers and professionals, known as EB-3) would likely become available for most nationalities in FY2006, which begins on October 1, 2005. Unfortunately, this has not come to pass. Although the EB-3 classification goes from being completely unavailable to backlogged, the backlogs continue to exist for nationals of every country. Thanks to legislation passed by Congress this summer, immigrant visas for Schedule A workers (nurses, most notably) are available at the present time.

Not only does the next fiscal year bring backlogs in the EB-3 classification, but expected backlogs have developed in the EB-2 classification (advanced degree professionals) for nationals of China and India. Unexpectedly, however, backlogs have emerged in the EB-1 classification (multinational managers and executives, outstanding researchers/professors, and individuals of extraordinary ability) for nationals of China and India. When you keep in mind that "nationals" refers to country of birth, and not necessarily country of citizenship, these backlogs are very bad news for many employers. A copy of the Department of State's October Visa Bulletin may be viewed at http://travel.state.gov/visa/frvi/bulletin/bulletin_2631.html.

As a practical matter, what this means is that adjustment applications may not be filed, or if pending prior to September 30,

2005, may not be adjudicated for nationals of the affected countries until the priority date – the date a labor certification application or, if no labor certification is required, the immigrant petition, is filed – is reached. Under current law, if you are or you employ a foreign national who was born in China or India, you can expect to wait five to eight years to complete the green card process. If the foreign national is running out of time in nonimmigrant status, it may not be possible to extend his or her nonimmigrant status long enough to wait for this lengthy period. The extent of the disruption that this development can be expected to make in the lives of foreign national employees, their families, and their employers cannot be understated. We urge all of you to consider contacting your Congressional representatives to inform them about the problems that you may face if immigrant visa quotas are not raised.

While we are endeavoring to contact our clients who may be affected by the visa retrogression, please contact us as soon as possible if you are or you have an employee who may be affected. Please also don't hesitate to contact us if you are interested in learning more about the visa retrogression, and what you can do to help change existing immigration policy.

US-VISIT: Travel Issues

As you may know, the Department of Homeland Security has implemented a program called US-VISIT to track entries into the U.S. This program requires biometric data to be taken from almost all visitors to the United States, first when their visas are issued at a U.S. consular office and later at U.S. ports of entry.

In addition, DHS is currently testing US-VISIT exit procedures at certain U.S. airports, seaports, and land border ports. Visitors leaving from these ports will be required to confirm their departures from the U.S. by scanning their visas or passports and repeating the digital finger scans. Eventually, most visitors will be required to check out upon their departures.

Some recent cases have demonstrated to us the ability of DHS to track the comings and goings of foreign nationals and the impact undisclosed departures may have on a particular application. Because a departure from the U.S. can have serious negative consequences on an application for immigration benefits, and because DHS now has the capability to track departures, it is imperative that all plans for foreign travel be discussed with counsel before any travel is made by a foreign national who has filed or plans to file an application for immigration benefits, particularly an application to change from one nonimmigrant status to another.

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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