Immigration Law Update

Current Developments in Employment-Based Immigration

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

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July 1999

Green Cards for Chinese and Indian Employees: Update

In our last newsletter, we reported that green card processing for Chinese and Indian employees was being delayed, in some cases for as long as four years, as a result of the immigrant visa quotas imposed by statute. This has meant that even if a Chinese or Indian citizen has had an approved immigrant visa petition, he or she has been unable to apply for a green card until his or her priority date (the date the petition or labor certification application was filed) is reached.

In a surprising move, the Department of State recently reported that as of August 1 there will be no backlog for Indian and Chinese citizens seeking to become permanent residents in an employment-based category. The Department of State's most recent Visa Bulletin reported that this is due to a substantial decrease in the number of adjustment of status applications being adjudicated by the Immigration & Naturalization Service ("INS"). This, in turn, is due to a hold on the processing of adjustment applications which has been in place for some time.

Because the hold on adjustment cases is temporary, the State Department expects that a new backlog in immigrant visas for Chinese and Indian nationals will form in the near future. In addition, it is possible that the cut-off dates which exist this month will actually move backwards in the future. For these reasons, if you have any Chinese or Indian employees who are now eligible to adjust status to permanent residence, we strongly advise them to file for adjustment AS SOON AS POSSIBLE. A copy of the Visa Bulletin can be obtained from our office or the internet at http://travel.state.gov/visa_bulletin.html. If you have any questions regarding this issue, please contact us.

Change in Advance Parole Regulations for Hs and Ls

The INS recently published new regulations changing the requirements for advance parole for individuals holding H-1, H-4 or L visa status. Under the regulation, published June 1, 1999, an individual in H-1, H-4 or L visa status who is adjusting status to permanent residence may reenter the U.S. without advance parole as long as he or she has a valid H-1, H-4 or L visa stamp in his or her passport, and is able to present the original receipt for the adjustment application.

Under previous rules, all individuals who had applied for adjustment of status who then left the United States temporarily were deemed to have abandoned those applications unless they first obtained advance parole.

Although this change will be helpful to many individuals, many others should continue to seek employment authorization and advance parole when filing for adjustment. These would include employees whose H-1 or L-1 visa status is due to expire soon, or those individuals who travel frequently but who are not eligible for multiple entry visas (such as citizens of China).

If you have any questions concerning this new regulation and its effect on your employees, please contact Rosner and Associates.

H-1B Cap Reached

As many of you already know, the H-1B cap was reached in early April this year, although the INS did not officially confirm this until mid-June. As a result, no new H-1B visas may be obtained prior to October 1, 1999. Fortunately, however, the INS has published a rule which extends the 60 day grace period for F-1 students seeking to change their status to H-1B until approval of the H-1B. It is expected that, unless Congress can be prevailed upon to eliminate the cap, it could be reached again as early as January 2000.

If you have been affected by the H-1B cap, please consider contacting your Congressional representatives to ask them to eliminate the cap. If you would like a sample letter, please contact Rosner and Associates.

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H-1B VISA AVAILABILITY WARNING!!

The Immigration & Nationality Act limits to 65,000 the number of new H-1B (professional specialty worker) visas that may be issued in a given fiscal year. As you may be aware, that number was reached during the last fiscal year in mid-August 1997. As a result, new H-1B visas were unavailable until the start of the 1998 fiscal year, which began on October 1, 1997.

As of February 20, 1998, the number of new H-1B visas issued during FY1998 reached 35,000. The INS expects that the 65,000 cap could be reached this year as early as May. This would mean that individuals seeking to enter the U.S. for the first time in H-1B status, or those who seek to change from another status (such as F-1 student) to H-1B will be unable to do so until at least October 1, 1998.

If you currently employ foreign students or exchange visitors whose authorization to work will expire prior to October 1, 1998, we strongly urge you to begin the H-1B visa process immediately for eligible employees you wish to continue to employ. If you do not do so, you may lose the service of valuable workers.

Congress is currently holding hearings on the subject of the H-1B cap. If this matter concerns your business, we strongly advise you to contact your Congressional representatives to voice your opinion as soon as possible.

For additional information, please contact Rosner and Associates.

Plan Ahead for INS and Labor Department Processing Delays

Recent changes in U.S. immigration law and INS processing procedures have resulted in the INS reallocating its resources at its four regional Service Centers. These Service Centers adjudicate the majority of petitions filed with the INS. As a consequence, the processing times for routine matters, including H-1B and L-1 (intracompany transferee) visas and immigrant visa petitions, have increased. Petitions that formerly took two weeks to process can now sometimes take two months to complete. Immigrant visa petitions can take anywhere from a month to three months to adjudicate, and adjustment of status from nonimmigrant to permanent resident can take over a year. It can now take up to 30 days to obtain a Labor Condition Application for an H-1B visa, and labor certification processing may stretch to three years.

When seeking to hire foreign workers, companies should be mindful of these processing times. Advance planning and patience can avoid the consequences of unlawful employment or dashing employee expectations.

Reduction in Acceptable Documents to Prove Work Authorization on Form I-9

Current law requires that an employee present either a document from List A (combined identity and work authorization) or one from each of List B (identity) and List C (employment eligibility) in order to verify employment authorization on Form I-9. The 1996 Illegal Immigration Reform and Responsibility Act ("IIRAIRA") reduced the number of documents which may be used. The INS proposed regulations implementing these changes on February 2, 1998. Some of the documents which have been eliminated include certificates of citizenship and naturalization, reentry permits, and refugee travel documents (List A), Federal, local, school or military identification cards and voter registration cards (List B), and certificates of birth abroad, U.S. birth certificates, and unexpired INS Employment Authorization Documents (List C). (The EAD is still on List A.) Comments on the rule are due on or before April 3, 1998. We will advise you when the rule is finalized and a new Form I-9 becomes available.

Unlawful Presence: What Is It, and What Does it Mean for Your Employees?

IIRAIRA imposed several penalties on individuals who are unlawfully present in the U.S. for certain periods of time. When employing foreign nationals, it is important to be aware of their immigration status, both in the past and in the future to avoid disruptions in your business.

The INS and the Department of State have defined "unlawful presence" to mean any period of stay beyond that authorized on a person's Form I-94, the card an individual completes on entering the United States and which is stamped and stapled in the individual's passport. Penalties for unlawful presence can include the following: (1) if the period of unlawful presence is in excess of 180 days, the individual who subsequently departs the U.S. is inadmissible for three years; (2) if the unlawful presence exceeds one year, the individual who subsequently departs the U.S. is ineligible to reenter the U.S. for ten years; (3) any period of unlawful presence, regardless of how long or how short, will force the individual to return to his or home country to obtain a visa to enter the U.S. - it is not possible to obtain a visa in Canada, Mexico, or other third country, absent exceptional circumstances; (4) in most cases, a person who has been unlawfully present will be unable to adjust to permanent resident status in the United States - obtaining a "green card" will require the individual to wait in his or her home country for processing. There are exceptions and waivers available in some situations; the most significant of these allows employment-based immigrants to

adjust their status if the total period of unlawful presence did not exceed 180 days. However, it is important to ensure that your employees, as well as their dependents, maintain a valid immigration status throughout their employment. Failure to do so could result in your company losing the services of valued employees for months, even years, or in an inability of your employees to travel abroad.

For more information on unlawful presence and its consequences, please contact Rosner and Associates.

Avoiding the Pitfalls of Unauthorized Employment

In recent months, we have become aware that the INS is stepping up its efforts in enforcing the employment eligibility verification requirements, or I-9 rules. Many employers are being served with subpoenas concerning their I-9 records, and are facing substantial penalties for violations.

Employers must understand how to complete Form I-9 and which documents to use to verify employment. As described above, there have been changes to the types of documents which are acceptable evidence of employment authorization.

INS Proposed Fee Increases

In January, the INS proposed increases in processing fees for many petitions, including Form I-129 (Nonimmigrant Worker), Form I-140 (Immigrant Worker), Form I-485 (Adjustment of Status), and I-765 (Employment Authorization). The new fee schedule will become effective 60 days after the publication of the final rule, which is not expected until this summer. Some of the new fees are as follows (current fees are indicated in parentheses): Form I-129 - $110 base fee ($75); Form I-140 - $115 ($75); Form I-485 - $220 ($130); Form I-765 - $100 ($70).

We will advise you when the new fees become effective. Please call us if you wish to know about the processing fees for other petitions.

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H-1B NEWS

As you are probably aware, the Immigration & Nationality Act limits to 65,000 the number of new H-1B (professional specialty worker) visas that may be issued in a given fiscal year. That limit was reached in mid-May 1998. As a result, new H-1B visas are unavailable until the start of the 1999 fiscal year, which will begin on October 1, 1998.

Since May, the United States Congress has been debating several bills which would raise the cap and make changes to the H-1B program. Despite rumors that the cap had in fact been raised, Congress has not yet passed any legislation on this issue, nor are they expected to do so until at least mid-September.

At this time, the House and Senate have tentatively agreed on a compromise bill, H.R. 3736, which would raise the cap, include recruitment attestations for "H-1B dependent" employers, and provide new funding for college scholarships and training for American workers. Votes on the bill are to be held in early-September, although some members of Congress are working to kill the bill.

INS advises that there are 16,000 - 17,000 H-1B petitions currently pending in its four Regional Service Centers. If the cap is not raised, we can expect that it will be reached several months earlier than in this year, and perhaps as early as January 1999.

If you are interested in learning more about the H-1B bill or are willing to write letters in support of the bill, please contact Rosner & Associates for additional information. We will keep you informed about changes to the H-1B program.

INS Raises Processing Fees

On August 14, 1998, the INS finalized changes in its processing fees which had been proposed in January. The new fees will go into effect for all applications filed on or after October 13, 1998. Some of the most commonly used forms and the revised fees are listed below.

I-129. Petition for Nonimmigrant Worker. $110 base fee.

I-129F. Petition for Alien Fiancé(e). $95.

I-130. Petition for Alien Relative. $110.

I-131. Application for Travel Document. $95.

I-140. Petition for Alien Worker. $115.

I-485. Application to Adjust Status. $220 ($160 for applicants under age 14).

I-539. Application to Extend/Change Nonimmigrant Status. $120.

I-751. Petition to Remove Conditions on Residence. $125.

I-765. Application for Employment Authorization. $100.

N-400. Application for Naturalization. $225. (Fee effective Jan. 15, 1999.)

Visa Lottery to be Held Oct. 1 – Oct. 31, 1998

The U.S. Department of State has announced the annual visa lottery will be held from October 1 to October 31, 1998. The visa lottery will make available 50,000 immigrant visas ("green cards") to randomly selected applicants from eligible countries. Rosner and Associates is sending out separate information on the lottery; information can also be obtained from the State Department's web site at travel.state.gov/index.html.

Effects of Terrorist Bombings on U.S. Immigration

As you know, the U.S. Embassies in Kenya and Tanzania were bombed by terrorists in early August, and the U.S. retaliated with air strikes in Sudan and Afghanistan two weeks later. As a result, consular services in some countries have been halted or drastically reduced, and in many countries, security around U.S. Embassies and Consulates has been increased.

These actions mean that applicants for both immigrant and nonimmigrant visas may face delays and additional questioning from U.S. Consular and immigration officers. This is particularly likely in the cases of visa applicants from Middle Eastern or African countries. In addition, obtaining nonimmigrant visas in some countries, including Kenya, Tanzania, Yemen, and Pakistan, may now be impossible. In addition, the current situation may make it difficult for citizens of the U.S. to obtain visas to travel to certain countries.

Please be mindful of these issues in making plans to bring employees or colleagues to the U.S. from overseas, or to send your U.S. employees abroad. In some cases, travel to a third country may be required to obtain a nonimmigrant visa. In addition, supplemental information may be required to overcome a consular officer's reluctance to issue visas to natives of certain regions.

Finally, the U.S. bombings of Sudan and Afghanistan have resulted in increased anti-American sentiment and threats to U.S. citizens abroad. We urge you to use caution and to consult the State Department's web site at travel.state.gov for travel advisories if you plan travel to Africa or the Middle East.

Please contact Rosner & Associates for additional information.

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

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

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

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

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

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

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

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

Green Cards for Chinese and Indian Employees

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

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

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

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

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

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

To obtain a current list of priority dates,

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

Labor Certification Issues: The Reduction in Recruitment Option

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

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

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

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

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

INS Raises Processing Fee for Naturalization

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

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