C O N N E C T !

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

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WELCOME TO CONNECT!

Connect! highlights business immigration issues that top the agenda in our nation's capital. This newsletter includes information useful to employers, including updates on new legislation and regulations that will impact the business community's access to foreign workers, and articles that will help employers learn about the pitfalls and opportunities of our immigration laws. By working with members of Congress on these issues, employers can help shape our laws so that they are more responsive to, and respectful of, the business community's needs and concerns.

LEGISLATIVE UPDATE

H-2B Cap Reached, Immediate Relief Needed

U.S. Citizenship and Immigration Services (USCIS) officials announced that the H-2B cap on visas for short-term essential workers had been reached on January 3, 2004, just 3 months into the fiscal year. Unless Congress increases access to this important visa program, many U.S. employers across the nation may be forced to close their doors—some permanently.

The H-2B program is instrumental in providing employers with short-term essential workers where no U.S. workers are available. Moreover, H-2B visa holders help keep the doors of American businesses open. These workers include restaurant, landscape, food production, and hotel service workers. They fill the rosters of our minor league hockey and baseball teams, teach our children to ski, and repair helicopters that fight summer forest fires.

In the past, various employers could rely on college students and other individuals who would perform seasonal and temporary work. That is no longer the case. Employers today spend tens of thousands of dollars and considerable time in developing aggressive recruiting campaigns to hire Americans for short-term jobs. Over the years, employer report that the number of Americans willing to work in these temporary and seasonal positions has drastically declined.

Before an employer turns to the H-2B program to find short-term workers, he must engage in extensive recruitment for American workers. Only after the state and U.S. Department of Labor examine the employer's recruitment efforts and certify that there are no Americans available to fill these vacant positions does the employer becomes eligible to file a petition for H-2B workers with the Department of Homeland Security. Before these vacant positions are filled, the employer must identify qualified foreign workers and obtain approval for H-2B visas from the Department of State. Often the employer also provides transportation and lodging for the workers. The fact that the program is difficult and expensive, but widely utilized, demonstrates that it is a critical last-resort option for employers.

IN THIS ISSUE

Despite the bureaucratic hurdles and delays associated with the program, access to H-2B workers can make the difference in the ability of businesses to meet seasonal demands and remain profitable. However, the restrictive cap limiting the H-2B to 66,000 visas per fiscal year prevents many employers from getting the help

they need during their peak seasons.

This year marks the second consecutive year that the H-2B cap (66,000 per year) has been hit. Last year, the federal government stopped accepting applications for H-2B workers only 6 months into the federal fiscal year, and the negative impact on employers with peak seasons in the spring and summer was devastating. The exhaustion of the cap last year prevented many employers from operating at full capacity despite demand, holding annual events and hiring American workers because of the lack of short-term assistance. This year, the lack of access to this visa program will harm even more employers throughout the country.

It is important that U.S. employers reach out to Congress to urge their Senators and Representatives to increase access to these vital short-term workers. For more information on how the H-2B blackout will impact your business and how you can reach out to Congress, contact your AILA attorney. ■

H-1B and L-1 Programs Reformed

The H-1B and L visa programs are important tools for businesses in the U.S. that want to stay competitive in today's global economy. The H-1B visa allows employers to hire highly educated foreign professionals, many of whom have graduated from U.S. universities. These professionals use their expertise and cutting edge knowledge to help companies develop new products, provide new services and expand into new markets. In some areas around the country, H-1B professionals also fill the immediate shortages that exist in specific industries. The L visa, by contrast, allows international companies with operations in the U.S. to transfer their own executives, managers and employees with specialized knowledge. The transfer of such vital personnel enables international companies to expand their U.S.-based operations, which results in more opportunity for U.S. workers.

New reforms to both the H-1B and L visa programs were included in the Consolidated Appropriations Act of 2005 (Pub. L. No. 108-447, H.R. 4818), which was signed into law on December 8, 2004. Employers should be aware of these reforms since they will significantly impact both programs.

The H-1B cap was reached on the very first day of the fiscal year, leaving H-1B employers facing an H-1B visa blackout. The new law includes limited relief to the blackout by creating a permanent exemption from the H-1B cap for up to 20,000 graduates of U.S. universities who have earned a Master's or higher degree. However, this limited relief is insufficient because it is likely that the additional visas that result from the 20,000 capped exemption will be used up by or before April 2005. Congress will not address this crisis unless Senators and Representatives hear from employers about how the H-1B visa program benefits their businesses.

Examples of how companies use the H programs are the "evidence" that demonstrates to Congress why relief from the H blackout is critical. Examples can be anonymous; you need only identify the general location of the company and the industry type. Beyond that, a short and general narrative that focuses on how your company (and perhaps the surrounding community) has been positively impacted by access to an H-1B professional (or, negatively impacted because of a lack of access) is essential. If applicable, a brief description of how American workers, American competetivenss or the American people benefited from the presence of this H-1B professional would make your example even more compelling. Sending an example of H-1B usage to Congress should only take a moment, but its impact could be phenomenal.

In addition to the limited relief from the cap, the new law includes the following fees and restrictions:

- Makes permanent and increases the H-1B training fee to $1,500. The fee is cut in half for employers with less than 25 full-time employees. This fee went into effect upon enactment.
- Reinstates the non-displacement and recruitment attestations for H-1B-dependent employers, which expired at the end of fiscal year (FY) 2003.
- Increases the prevailing wage requirement from 95% to 100%. The new law also

mandates that where the Department of Labor (DOL) uses or makes available to employers a governmental survey to determine prevailing wage, such survey shall provide four levels of wages commensurate with experience, education, and the level of supervision. If a two-level wage survey is used, this section provides a formula for calculating the two additional intermediate levels.

- Reinstates and makes permanent the ability of DOL to initiate an investigation of an employer.

In reforming the L program, the new law puts into statute language clarifying the proper employment of international transferees with specialized knowledge who use the L-1B visa. Employers are prevented from primarily stationing L-1B visa holders at the work site of a third party in cases where they would not be controlled and supervised by the petitioning employer. Employers also are prohibited from placing L-1B visa holders at the third party site if the placement is part of an arrangement to provide labor for the third party rather than in connection with their duties involving specialized knowledge specific to the petitioning employer. Such tailored reform clarifies the appropriate use of the L visa program, yet does not hinder the program's ability to support the U.S. economy. The new L-1 visa reform also will:

- Change from the six-month work requirement for L-1 blanket petitions to a one-year work requirement, thereby requiring that all L-1 applicants have worked for the employer abroad for at least one year.
- Require the Department of Homeland Security to maintain statistics on petitions filed for L-1 visas, including the number of L-1B petitions approved where the visa holder will work primarily offsite.

The modifications to the L-1 program included in the new law originally were included in S. 1635, the "L-1 visa (Intracompany Transferee) Reform Act," introduced by Senator Saxby Chambliss (R-GA) which the Senate Judiciary Committee previously had approved.

The L visa came under severe scrutiny in the 108th Congress, with several bills introduced that would have dramatically restricted this visa category. With the exception of S. 1635, these bills were overreaching in their reform of the L-1 visa program and many of them confused the L visa with the H-1B visa. If enacted, these bills would have halted the expedient transfer of international personnel so necessary in today's economy and would have stifled a job-creating visa that has operated with a nearly unblemished record for over 30 years.

In addition to the modification of the H-1B and L visa programs, the new law subjects both visa categories to an additional $500 "fraud detection and prevention fee." This fee is in addition to other fees and applies to employers filing either an initial petition for an H-1B or L visa, a change of status or change of employer petition. A $500 fraud fee will also be charged for an alien filing a visa application abroad for an L blanket petition. The fee, which will go into affect on March 8, 2005, will be split among the Department of State, Department of Homeland Security and Department of Labor in order to fund their anti-fraud efforts.

While the limited exemption from the cap provides some relief from the restrictive H-1B cap, this fix is clearly insufficient to meet the demands for foreign professionals. As our economy continues to improve, U.S. employers will need professionals with cutting edge knowledge and skills who graduate from U.S. universities, as well as professionals with the ability to tap into new markets that enable U.S. businesses to expand and grow. In addition, shortages in specific regions across our country in professions such as teaching, medicine, and dentistry will cause U.S. employers to look to the H-1B program to fill professional positions that would otherwise remain vacant.

For more information on how the new laws will impact your company's use of the H-1B and L visa program, please contact your AILA attorney. Your attorney also has information to help you prepare examples of positive H-1B usage and reach out to Congress about the continued need for increased access to these highly educated foreign professionals. ■

New Law Extends Foreign Physician Program

President Bush, on December 3, signed legislation that extends and modifies the "Conrad 30" J waiver program for foreign-born physicians (S. 2302, Pub. L. No. 108-441). Under the program, individuals who participate in

medical residencies in the United States on exchange program (J) visas are exempted from the program's two-year foreign residence requirement if they agree to practice medicine for three years in an area designated by the Secretary of Health and Human Services (HHS) as having a shortage of health care professionals. The program is extended until June 1, 2006.

The new law makes several important changes to the J waiver program. First, it specifies that physicians who are sponsored for a waiver by either a federal or state agency are exempt from the H-1B cap. The bill also allows five of each state's 30 waivers to be issued to doctors who practice medicine in areas not designated by the Secretary of HHS as having a shortage of health care professionals, if the doctors receiving the waivers practice in facilities that serve patients who reside in areas designated by the Secretary as having a shortage of health care professionals. Finally, the measure permits foreign doctors receiving a waiver to work in medically-underserved areas in either primary care or specialty medicine. Under current law, only state agencies and the Veteran's Administration are permitted to sponsor specialists. To request a waiver for a specialist, however, the interested agency would be required to demonstrate a shortage of doctors able to provide the appropriate medical specialty in the designated geographical area.

For more information on this program and the accessibility of foreign doctors, contact your AILA attorney. ■

AGENCY UPDATE

New Developments to US-VISIT

What do highly educated foreign professionals, short-term temporary workers, critical personnel of an international company, and foreign investors have in common? If they are dealing with businesses in the U.S., the answer is easy: each must enter our country through a port of entry and, in most cases, that means enrolling in the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. This rapidly expanding program, operated by the Department of Homeland Security (DHS), is designed to record foreign nationals' biometric information as they enter and exit the country. Continue to read Connect! for reports on the latest US-VISIT developments so that you can properly prepare your business' international travelers.

Enrollment in US-VISIT occurs at ports of entry where the program has been implemented. Currently the entry portion of US-VISIT is operational at 115 airports and 14 seaports, and, as of December 29, 2004, at the 50 busiest land ports. Statutory deadlines requires US-VISIT to be operational at all U.S. ports of entry by the end of 2005. It is still unclear whether DHS will be able to meet that deadline.

Currently, US-VISIT applies only to nonimmigrant visa holders and, as of September 30, 2004, visa waiver program participants. Canadians entering without visas and those Mexican nationals who do not require an I-94 arrival/departure record and enter with a laser visa will remain exempt from US-VISIT.

In addition to the traditional admission procedure, the traveler's documents are scanned, and the US-VISIT program uses digital fingerprints and a digital photograph to confirm a foreign national's identity. The traveler's data are then checked against DHS databases and law enforcement watch lists. Information is also collected on immigration and citizenship status, nationality, country of residence, and residence while in the United States.

At a limited number of test sites, the US-VISIT program also tracks departures from the country. If a foreign national departs the U.S. from an airport with US-VISIT departure capability, the individual must input his or her departure information, visa data and fingerprints into the US-VISIT system through an automated self-service kiosk (similar to an ATM machine). In some cases, the foreign national also may have to register his departure with an US-VISIT official equipped with a portable US-VISIT device. By summer 2005, DHS is expecting to launch a new pilot program to test US-VISIT exit procedures at three land ports: Nogales, Arizona, Alexandria Bay, New York, and Pacific Highway and Peace Arch, Washington. This pilot program

will utilize radio frequency (RF) technology as a means to implement the exits at land ports. Conceptually, RF technology could transmit biographical information to the inspections officer, in order to speed processing of automobile traffic. This technology would presumably also link to the US-VISIT databases and watch lists. Even if such a technology is made available, it is unclear how efficiently the US-VISIT exit function will operate at the land borders given infrastructure constraints.

It is important for businesses to note that the US-VISIT information is used to screen individuals and to ensure that foreign nationals do not remain in the country beyond their period of authorized admission. Failure to comply with US-VISIT procedures could have negative consequences on a foreign national's ability to remain in or re-enter the United States.

Contact your AILA attorney to learn more about the US-VISIT program and to determine the entry and exit requirements for your foreign national employees and clients. ■

DHS Expands the Basic Pilot Program

U.S. Citizenship and Immigration Services (USCIS), on December 20, 2004, announced the expansion of the voluntary Basic Pilot Program to all 50 states and the District of Columbia. As background, the USCIS currently operates a pilot program (the Basic Pilot Program) which allows employers to get automated confirmation of a newly hired employee's work authorization after an Employment Eligibility Verification form (Form I-9) has been completed. This pilot program was offered to employers in six states. Congress directed USCIS to expand it to all 50 states and the District of Columbia. In addition to the expansion, USCIS is offering Web-Based Access for the Basic Pilot Program to all employers who volunteer to participate.

Although the Basic Pilot Program is now available nationwide, the Department of Homeland Security is still working to improve the accuracy of data and interoperability of the databases used by the program. Contact your AILA attorney for more information on the abilities and limitations of the Basic Pilot Program and to discuss whether the program is right for your business. ■

SPOTLIGHT

New Labor Certification Process Announced

In an environment of decreasing budgets and increasing backlogs for the cumbersome permanent labor certification program, the Department of Labor (DOL) needed to develop a streamlined application process while protecting against fraud in the program. Such certification is the first of several steps an employer must take to sponsor a foreign national for permanent residence (green card). After years of review DOL, on December 27, 2004, announced the final plans for a revamped labor certification program-the Program Electronic Review Management (PERM) program. The new PERM program will go into effect on March 28, 2005.

Under current regulations, employers may file for a labor certification through the "traditional" method or through "Reduction in Recruitment" (RIR) filing. When using the "traditional" method, employers provide the State Workforce Agency (SWA) with the wage offered, duties for the position, minimum educational requirements, training and/or work experience required and special skills required. The SWA verifies that the wage is a prevailing wage for the position and directs the employer to conduct recruitment. After the recruitment period, the SWA forwards the application to the DOL for certification. The second option, RIR processing, allows employers to conduct recruitment for the position first and then file for a labor certification. Like the traditional method, the application is first filed with the SWA, which forwards it to DOL for final certification. Employers are eligible to use RIR filing if they can demonstrate that there are no qualified U.S. workers available for the position; the application does not contain any restrictive requirements; the job is being offered at the prevailing wage; and, adequate recruitment has been conducted within 6 months prior to filing the application.

PERM will eliminate the traditional labor certification process and create one process for labor certification that is based primarily on the current procedures for RIR filing. Under PERM, employers will have to obtain a prevailing wage determination from the SWA in the state where the foreign national would be employed; post a notice of the filing of an application for certification of foreign national employment at the worksite and in in-house electronic or print media; engage in their own recruitment; and, attest that no qualified U.S. workers were available.

Employers under PERM will be required to print the job advertisement in the newspaper and/or trade journals, where appropriate, and file the job order with the SWA. For positions that are included on the DOL's list of professional occupations, employers will have to conduct at least three additional forms of recruitment. Acceptable forms of recruitment include: attending job fairs; on-campus recruitment; utilization of private employment firms; recruitment from professional or trade organizations; and advertisement of the job on the employer's external website or on a job search website.

Once the PERM application is completed and the recruitment period ended, the employer will have to file an application, either electronically or by mail, with the regional DOL office (without including any supporting documentation of the unavailability of U.S. workers.) The DOL computer system will then check the application for completeness and whether there is information, such as a wage offered that is below the prevailing wage for the position, that "flags" the application for additional examination. DOL will select these "flags" that indicate "problematic" applications needing supervised recruitment or audit. In order to test the system, certain applications will be randomly audited. If selected for an audit, the employer will be sent a letter requesting documentation to support its attestations. Following an audit, a case would either be approved or denied. If no "flags" are hit, certification of the attestation should be expected in roughly 45-60 days.

Considering the extensive backlogs with the traditional labor certification process and even backlogs in the RIR labor certifications, employers should consult their AILA attorneys about refiling labor certifications under PERM. Refiling without the loss of the original filing date is possible if certain conditions are met: the new application describes an identical job opportunity; the employer complies with all the requirements for recruitment called for under PERM; and the employer withdraws the application pending under either the traditional or RIR application process.

For more information on PERM and for advice how your business can utilize PERM processing, contact your AILA attorney. ■