C O N N E C T !

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

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WELCOME TO *CONNECT!*

Connect! is a monthly newsletter that focuses on business immigration issues that top the agenda in our nation's capital. It contains helpful information about employing foreign nationals, updates on new regulations and the latest information on proposed legislation and new laws that could impact the business community's access to foreign workers. By being well informed on issues that impact business immigration, employers will know about the pitfalls and opportunities that result from our immigration laws. By working with members of Congress on these issues, employers have an opportunity to help shape our laws to be more responsive to, and respectful of, the business community's needs and concerns.

LEGISLATIVE UPDATE

House and Senate Pass Department of Justice Authorization Bill

President Bush shortly will sign a bill that will have a positive impact on several aspects of business immigration. The 21st Century Department of Justice Appropriations Authorization Act (H.R. 2215), the final version of which was the subject of much negotiation, would permit H-1B visa holders who have long pending labor certification applications to extend their status beyond the 6th year limitation; expand and extend the Conrad J-1 program for medical doctors; and address certain EB-5 issues. A review of these immigration provisions follows.

Extension of H-1B Status for Aliens with Lengthy Adjudications: Provisions in H.R. 2215 were designed to counterbalance the Department of Labor's lengthy labor certification processing times. These delays have precluded some H-1B visa holders from being eligible to apply for their 7th year H-1B extension. The provision, introduced by Representative Lamar Smith (R-TX) during conference and expanded by Senator Patrick Leahy (D-VT), would permit aliens with labor certification applications caught in lengthy agency backlogs to extend status beyond the 6th year limitation as long as 365 days have elapsed since the filing of a labor certification application (that is filed on behalf of or used by the foreign national) or an immigrant visa petition. This extended status applies even if the foreign national has since changed status or left the country. However, if an application for a labor certification, adjustment of status, or a petition for an immigrant visa petition is denied, the extended H-1B status ends at that point.

Under current law, H-1B visa holders who have reached their maximum six-year time allotment can extend their status for one year if they have a petition for permanent employment pending for at least one year since the filing of the original labor certification.

Waiver of Foreign Country Residence Requirement with Respect to International Medical Graduates: H.R. 2215 would extend until 2004 a program that authorizes visas for foreign medical graduates wishing to serve in the United States in medically

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underserved areas of the country. The bill would also raise the number of visas available per state under this program from 20 to 30. Proponents advocated in support of making the program permanent, but could not overcome the objections of House Republicans.

EB-5 Amendments: Congress established the EB-5 immigrant investor visa category in 1990 to promote investment and job growth in the United States. To qualify, a foreign national must invest at least one million dollars (or $500,000 in targeted areas of low employment or rural areas) and show that the investment generates at least ten jobs. When investors first make their investment, they get a "conditional" green card good for two years. At the end of that time they must prove that they have satisfied the requirements of the law before the Immigration and Naturalization Service (INS) will remove the condition and make them regular green card holders.

In 1998, the INS significantly restricted eligibility for EB-5 status and applied the new restrictions retroactively. The INS restrictions adversely affected several hundred immigrant investors who had made their investments in good faith based on the rules in effect before the 1998 decisions.

The EB-5 provisions in the legislation would create new procedures for the investors caught by the retroactive applications of the INS' changes and would give them an opportunity to reestablish EB-5 eligibility. Those deemed to have met those requirements would be granted unconditional permanent resident status. Those who have not yet met these requirements would have two more years to complete their investments and to demonstrate the requisite job creation/saving, receiving credit for amounts invested and jobs created or saved to date.

The legislation also makes some modest changes to the general EB-5 program. Most importantly, it would eliminate the "establishment" requirement for EB-5 investors. Instead of having to prove that they have "established" a commercial enterprise themselves, investors would need only show that they have "invested" in a commercial enterprise. This change would make it easier for foreign nationals to qualify under the program.

Please contact your AILA attorney for more information on how this legislation would impact your business. ♦

Update on the Proposed Department of Homeland Security

The previous issue of *Connect!* focused on how the inclusion of our nation's immigration functions within the proposed Department of Homeland Security would dramatically impact every aspect of immigration, from the adjudication of visas, the enforcement of immigration law, and the implementation of regulations that affect employers and the daily lives of foreign national workers. That issue also noted that restructuring of the Immigration and Naturalization Service (INS) may occur as Congress addresses creating this new security agency and that S. 2452, the bill introduced by Senator Lieberman (D-CT), could help initiate positive reform by coordinating the separated service and enforcement components of the agency that would be housed within one division under the control of a strong leader. Since this last issue, the Senate recessed without passing legislation due to intense disagreement over civil service protections within the new Homeland Security Department. It is unclear if the Senate will return to the issue during the upcoming "lame duck" Congressional session or deal with the issue as the first order of business when the 108th Congress convenes next year.

While the debate continues, the Administration is trying to build support for placing the immigration function within the Border and Transportation Security (BTS) division. Such a structure is reflected in the bill (S. 2794) introduced by Senator Phil Gramm (R-TX). This placement would make humane services to immigrants and effective enforcement of our immigration laws nearly impossible by burying our immigration functions within this large division, and stands in contrast to the effective structure proposed in S. 2452.

Recently, the Administration has indicated that it is considering an alternative plan that would keep the service functions within a separate fifth division, but would place inspections and Border Patrol in the BTS division. However, such a plan would be unworkable. For instance, during the inspections process the services and enforcement functions must be coordinated since a single inspector must examine a potential applicant through both a services and enforcement lens in order to determine admissibility to the United States. If the inspections process were placed within the large BTS division, it would not be coordinated sufficiently with other aspects of immigration. Furthermore, adjudications at our borders could, and likely would, differ from adjudications that take place in the interior, with such inconsistency ill-advised and leading to negative consequences.

S. 2452 advances a different organization of our immigration functions that separates and then coordinates our immigration functions under the control of a single leader. The bill would transfer our immigration functions into its own separate fifth division within the new department and would restructure these functions by splitting up enforcement and services into two equal branches under a leader who has the authority to coordinate them. This proposed coordination within the fifth division is key, since almost every immigration-related action involves both enforcement and service components.

This restructuring will be key to the agency's ability to achieve consistent interpretation and implementation of policy that in turn will lead to more efficient adjudications and effective enforcement.

It is very important for businesses to become involved in how our immigration functions are structured within the proposed homeland security department and how immigration is treated within an environment that emphasizes security. While it is vitally necessary to keep out the people who mean to do us harm, our country must continue to admit those who want to help build America and who are central to our continued economic growth and ability to compete in the global economy. Please contact your AILA attorney for information on how to work in support of S. 2452. ♦

Demand for Essential Workers Increases, Legislation Introduced that Spotlights the Issue

Employers have long known that many of our immigration laws are out of sync with our nation's economic needs and in desperate need of reform. This disjuncture is especially acute when employers attempt to fill essential worker positions. Essential workers are the unskilled or semi-skilled workers employed in all sectors of our economy. They include restaurant workers, retail clerks, construction workers, manufacturing line workers, hotel service workers, landscape workers, and health care aides. Department of Labor statistics indicate that the demand for these workers is increasing and will rise to new levels during the next ten years, with the number of native-born workers insufficient to meet the need. Furthermore, because the median age of the native-born workforce is rising and native-born workers are becoming increasingly more educated, the typical U.S. worker is uninterested in filling lower-skilled, lesser-paid positions.

Employers traditionally have found a limited supply of workers willing to fill essential worker positions, and have often tried to turn to foreign labor to fill positions. What they have run into, however, is an immigration system that makes it virtually impossible to legalize hard-working people already in the U.S. or allow others to obtain visas. Many employers report that they find out that many of their vitally needed workers are undocumented and that there is no avenue to make them legal. Furthermore, under the current immigration system, there is no legal means by which lesser skilled foreign nationals can come here to work on a year round temporary basis. The temporary visa program currently available for individuals at this skill level is only useful for employers who can establish that their need for foreign workers is seasonal, a one-time occurrence, or a peak load or intermittent need. Conversely, the green card process for essential workers is extremely limited. Only 5,000 visas are available annually and the backlog of cases is over ten years.

The need for immigration reform that would "match willing workers with willing employers" was central to the discussions President Bush and Mexican President Vicente Fox held before the September 11 attacks. The comprehensive immigration reform that was under discussion at that time included an earned legalization program, an expanded permanent visa program, an enhanced temporary visa program, border control cooperation and economic development in Mexican sending regions. These talks stalled after the terrorist attacks, with the Bush Administration focused on security, apparently not recognizing that immigration reform is key to enhancing our security. Such reform would allow our country to focus on the people who mean to do us harm, not those who seek to enter, or reside in our country, to meet our labor force needs, reunite with close family members, or escape persecution.

Recently introduced legislation responds to our need to reform our immigration system and has returned this issue to the nation's attention. House Minority Leader Richard Gephardt (D-MO), on October 10, introduced the Earned Adjustment and Family Unification Act of 2002, H.R. 5600. This legislation includes an earned legalization program for resident workers and college-bound students who meet certain requirements. Eligibility would be limited to applicants who have continually resided in the United States for at least five years. In addition to the residency requirement, people would have to meet certain criteria in order to demonstrate that they had "earned" the ability to legalize their status. Applicants would have to present evidence of employment in the United States for at least 520 days during the preceeding five years. They would also have to pay, or provide evidence of payment of, all Federal and State tax liabilities incurred during such employment. Minimal understanding of the English language or evidence of the pursuit of the study of English would also be required. A family unity provision included in the bill would allow family members to accompany or follow to join the worker. Furthermore, the bill also includes provisions that would reduce the backlog in family immigration.

The pending legislation is unlikely to pass before the end of the year. However, the bill will be reintroduced when the 108th Congress convenes next year. The legislation is an important first step towards comprehensive immigration reform that, along with an earned adjustment program and expanded legal channels for family and business-based immigration, would also create a new temporary worker program. If you have questions, please contact your AILA lawyer for more details about how the pending legislation could affect your business and how you can become an advocate for good immigration reform. ♦

INS Moving Forward with Special Registration Program

Human Resources personnel should note that certain foreign nationals in their workforce are now, or may soon be, subject to special registration requirements that compel them to register with the INS every year and limit the points of departure from which they may exit the United States. The special requirements imposed on these individuals may result in business travel complications, as well as an annual absence from work due to mandatory office visits to the INS. Human Resources personnel also should be aware that most individuals who are obligated to participate in this program are only required to do so because of broadly sweeping regulations that target specific nationalities.

The special registration requirements are the product of the INS's newly implemented National Security Entry-Exit Registration System. This registration program designates certain foreign nationals entering the U.S. on temporary visas as "high risk" aliens and requires them to undergo special registration, photographing and fingerprinting requirements upon their arrival to the United States. Registrants must then register at an INS district office 30 days after they enter the United States and re-register annually. If a registered foreign national leaves the United States for either business or pleasure, he or she must notify the INS of all plans for departure, and depart through one of eighteen pre-approved airports or one of fifty approved land or seaports. Failure to notify the INS of a departure could render a foreign national inadmissible upon return to the United States.

The INS considers foreign nationals to be "high risk" if they were born in or last resided in Iran, Iraq, Libya, Syria, or Sudan; or if a consular officer or inspections officer has reason to believe they are citizens of or last resided in one of the countries listed (this even applies to foreign nationals who have dual citizenship with another non-designated country); or if they meet or are suspected of meeting certain criteria. While Iran, Iraq, Libya Syria and Sudan make up the official list of countries whose nationals are required to register, the INS has expanded the list to include citizens and nationals of Pakistan, Saudi Arabia, and Yemen who are males between 16 and 45 years of age. Additional countries likely will be added as the program expands. Furthermore, the INS is authorized to require registration on a case-by-case basis. In addition, recently released expansion plans include requiring foreign nationals, no matter their nationality, to undergo special registration if they have done any of the following: taken unexplained trips to certain designated countries; have other instances of unexplained travel; previously overstayed a nonimmigrant visa; or match characteristics established by intelligence information.

Please contact your AILA attorney for more information on this important new program. ♦

Taking a Look at Temporary Protected Status

Congress recently extended the Temporary Protected Status (TPS) designation for several countries, providing nationals of these countries with a special immigration status and work authorization.

TPS can be granted to qualifying nationals from certain countries that are experiencing civil strife, natural disasters, or other emergencies. Eligible individuals must file an application for both TPS status and work authorization with the INS that show that they are eligible for the program. Most recently, this status has been authorized for Liberian nationals, effective October 1, 2002, with the registration period ending on April 1, 2003.

Currently TPS status has been extended and the re-registration period is current for the following countries:

El Salvador: TPS status for Salvadoran nationals, originally set to expire on September 9, 2002, will now expire on September 9, 2003. Individuals who are in the United States and eligible to work pursuant to this program must re-register for TPS between September 9, 2002, and November 12, 2002. Qualified Salvadoran nationals can now remain in the United States and will retain their work authorization until September 9, 2003. In recognition that the INS will be unable to issue new employment authorization documents (EADs) to all the program participants before their current work authorization documents expire on September 9, 2002, the Attorney General has automatically extended the validity of all EAD cards issued in conjunction with this program until March 9, 2003. Employers should be aware that these cards will still state that they expire on September 9, 2002— no new EAD cards or extension stickers will be issued by the INS to indicate the extended period of validity.

Sudan, Sierra Leone and Burundi: The TPS designations for Burundi, Sierra Leone and Sudan have been extended for one year and will now expire on November 2, 2003. Program participants for Sudan and Burundi must have re-registered for TPS status and an extension of employment authorization by October 29, 2002. Partici-

pants from Sierra Leone must re-register by December 30, 2002. Although re-registration is typically limited to individuals who registered under the initial TPS designations, Burundi and Sudanese nationals may be able to apply for TPS and work authorization under late initial registration provisions.

If you have any questions about whether or not one of your employees is included or could be included in the TPS program, please contact your AILA lawyer. ♦

HIGHLIGHT

Employees and Employers Can Now Check Case Status Online

The INS recently launched a new online system to check the status of cases pending at an INS regional service center. Prior to this new system's implementation, all case status inquiries had to be made by telephone. Due to the volume of calls, such inquiries easily took twenty minutes or more just to get through to the automated operator.

The new online system, which can be found on the INS web site at: https://egov.ins.usdoj.gov/graphics/cris/jsps/index.jsp?textFlag=N, should eliminate most of the wait associated with case status updates. The petitioner or visa beneficiary simply types in his or her INS receipt number in order to receive the date the receipt notice was sent out by the INS, the processing times for the service centers and the contact information for the five INS regional service centers.

Employers and visa applicants should be aware that the service center processing times often do not take into account current backlogs. It is a good idea for visa applicants to check the case status verification system whenever they want a general overview of how their case is proceeding, but employers may want to contact their AILA lawyer periodically to get more accurate processing time information. ♦