# C O N N E C T !

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

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## WELCOME TO CONNECT!

*Connect!* focuses on business immigration issues that top the agenda in our nation's capital. This newsletter includes information useful to employers, such as 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-1B Cap Reached, Bill Introduced**

This year many employers experienced difficultly hiring highly educated foreign professionals because of the reduction in the numerical cap on the number of H-1B professionals who can enter the U.S. this current fiscal year. Unfortunately many of the employers who lost out this year were looking to hire those foreign nationals with cutting edge skills who had recently received graduate degrees from America's top colleges and universities. Other employers, such as school districts, could not find enough teachers to fill the classrooms. Americans lose out without adequate access to these highly educated foreign professionals whose talents helps American businesses stay competitive and American children excel.

Because the H-1B cap dropped this fiscal year from 195,000 to 65,000 available visas ran out by mid-February. To make matters worse, left over H-1B visa petitions from the prior fiscal year and free trade agreements further reduced the availability of cap numbers this year. Roughly 11,600 cap-subject H-1B visas were left in the processing pipeline at the end of FY 2003, and even though FY 2003's H-1B petitions did not come close to hitting the 195,000 limit, these pipeline petitions were counted against this fiscal year's 65,000 cap. In addition, a little over 10% of the cap numbers were reserved for special H-1B visas for Chile and Singapore in accordance with their free trade agreements with the U.S. If the two countries do not use all the visas made available to them, the unused numbers should become available. However, it is unclear how USCIS is expected manage this process.

U.S. employers, both public and private, need adequate access to H-1B workers. However in order to bring about a positive change to the status quo, businesses must make their voices heard on this issue.

Recently, Congress took its first step toward responding to

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employers need with a bill that modestly increases access to highly educated professionals who have received graduate degrees from U.S. universities and colleges. On April 2, Representatives Lamar Smith (R-TX); John Carter (R-TX); Jeff Flake (R-AZ); Steve Chabot (ROH); Bob Goodlatte (R-VA); and Howard McKeon (R-CA) introduced the "American Workforce Improvement and Jobs Protection Act" (H.R. 4166). H.R. 4166 would permit an annual exemption from H-1B cap for 20,000 H-1B holders who obtained a graduate degree from a U.S. university. H.R. 4166 also would make narrowly tailored modifications to the L-1B visa category by including provisions contained in S. 1635, a bill introduced by Senator Chambliss (R-GA). (For a more complete discussion on the proposed changes to the L bill see the article entitled, "Renewed Congressional Debate Over L-1 Visa Program, Support of Business Critical" in this issue of *Connect!*)

Unfortunately, the modest benefits offered by this bill come with a steep price. H.R. 4166 would require H-1B employers to pay fees and some employers to make additional attestations. Specifically, the legislation would make permanent the $1,000 H-1B training fee and the non-displacement and recruitment attestations for H-1B-dependent employers, both of which expired at the end of the last fiscal year. It also would vest with the Department of Labor (DOL) the ability to investigate an H-1B violation without having to wait for a complaint to be filed. This authority also sunset at the end of FY 2003. In the past, these requirements were placed in the H-1B program in exchange for a dramatic increase in the H-1B cap numbers. In addition to these changes, H.R. 4166 also would impose a new $500 "fraud detection and prevention fee" on all H-1B and L applications.

Although H.R. 4166 moves in the right direction by providing increased access to H-1B professionals and protecting the legitimate use of the L visa, the bill's H-1B provisions should include an uncapped exemption from the cap for graduates of U.S. Master's and PhD programs. Such an uncapped exemption is appropriate given the benefits these graduates produce for the U.S. economy and the need to retain in this country U.S. educated talent, rather than sending them abroad to our competitors.

In addition to exemptions for this U.S. educated talent, another exemption should be included for federal, state and local government workers, including teachers. If a government agency (any federal, state or local government entity, including school districts), working on behalf of the citizens under its jurisdiction, requires a foreign worker, it is not beneficial to the interests of the governmental entity to restrict its ability to hire that person. Government agencies will almost always include mandate that make hiring a U.S. citizen preferable. In addition, if a government agency feels it is necessary to hire a foreign national, it should not be competing with the private sector for H-1B numbers. Nor should the government deplete the pool of H-1Bs, depriving U.S. businesses of economic opportunity.

Congressional action is the only way to ensure that U.S. companies will be able to employ needed H-1B workers. Be sure to contact your AILA attorney for information on how you can contact your Senators and Representatives on this very important issue. They need to hear from their business constituents about how companies use the H-1B visas and the need for such workers. ♦

**Immigration Reform Gets a Boost**

The prospect of immigration reform is getting a boost this year with the announcement of several proposals including the January 21 introduction in the Senate of S. 2010, the first comprehensive immigration reform bill introduced in Congress, and a second comprehensive immigration reform bill which will be introduced on May 4.

With the advent of comprehensive immigration reform, companies will be able to hire legally those workers who are currently in the U.S. under a questionable status. Companies that can not find U.S. workers will finally have a workable visa program that will allow them to fill vacant positions. Mechanisms will also be put in place to help unify those families that have been kept separate due to our broken immigration system.

Below is a review of this year's comprehensive immigration proposals:

- *Forthcoming bill:* On May 4, Senator Kennedy (D-MA), Representatives Menendez (D-NJ) and Gutierrez (D-IL) and others will introduce a comprehensive immigration reform bill that will include an earned adjustment for hard-working people residing in the U.S., new worker programs, and family backlog reduction.

The new bill reportedly contains a new "break-the-mold" worker programs that would make significant modifications to the current H-2B seasonal worker program and create a new longer-term temporary H-1D worker program for essential low-skilled workers. These programs would remain capped at 100,000 and 250,000 respectively. The visas would be valid for H-1D workers for 2 years and renewable for a limited number of times after that. For H-2B workers, visas would last for 9 months and would be renewable for up to 40 months. The visa programs also would permit the visa holders to change employers in certain situations and permit the workers to pursue LPR status (*aka* a green card). A streamlined application process is required for both visas, with employers having to meet certain U.S. worker recruitment requirements. The bill also would create new worker protections and would require a study to review worker programs.

The bill is expected to include an earned adjustment for hard working individuals who are currently in the United States. These foreign nationals would have to demonstrate that they have maintained employment, paid their taxes, committed to learning English and been present in the country for a specific amount of time. Those workers who have not lived in the U.S. for the requisite period of time would be eligible for a transitional worker status and would be able to earn their green card.

Finally, this bill would address the backlogs currently separating many family members by changing the immigration system to hasten family unity and reducing visa processing backlogs for family-based greencards.

- *The Immigration Reform Act of 2004: Strengthening Americas National Security, Economy, and Families (S. 2010):* Introduced by Senators Chuck Hagel (R-NE) and Tom Daschle (D-SD) on January 22, the Immigration Reform Act is the only initiative introduced to date that includes all three components necessary for comprehensive immigration reform: a new temporary worker program; access to an earned adjustment for eligible people already living and working in the U.S.; and family reunification through family backlog reduction. This bill takes on the hard issues and proposes solutions. While there are concerns with some of the bill's provisions, the Immigration Reform Act is a goes a long way toward helping achieve the goal of creating an immigration system that reflects America's values, traditions, and needs.

The Immigration Reform Act contains a "Willing Worker" program that revolves around a needed reform of the current H-2B seasonal worker program and the creation of a new H-2C program for low-skilled workers. The bill reforms the H-2B program as follows: it increases the program's numerical caps to 100,000 for five years, after which the numbers revert to 66,000; changes the visa duration of the H-2B from seasonal/temporary employment to admission for up to nine months in any twelve-month period (with a maximum of 36 months in any 48-month period); and, with some exceptions, it does not allow visa holders to change employers. The new H-2C program is a two-year program renewable for a total for four years. It is capped at 250,000 annually, and sunsets five years after regulations are issued. Visa holders may change their employers after three months, with exceptions for earlier transfers allowed under certain circumstances. A streamlined application process is required for both visas, with employers having to meet certain U.S. worker recruitment requirements. Both visa categories would permit workers to become green card holders.

The Immigration Reform Act of 2004 would create new worker protection provisions including a complaint-driven procedure in which the DOL and the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) would investigate claims and provide for mediation and, in certain instances, hearings and further appeals. The bill also establishes a commission to review the

impact of the program and report on wage determinations. Petition and filing fees for each worker are on a sliding scale, based on the number of the employer's employees.

The bill also includes an earned adjustment for hard working individuals who are currently in the United States. These foreign nationals would have to meet strict requirements in order to adjust their legal status in this country, including: physical presence for five years prior to the bill's introduction; documented employment for at least three years prior to the bill's introduction and at least a year post-enactment; payment of income taxes or entry into an agreement with the IRS to pay all outstanding liabilities; and payment of a $1,000 fee. To encourage employer participation, employers are not subject to civil and criminal tax liability related to the employment of these individuals. Those workers who meet the physical presence requirement, but not the work requirement of the earned adjustment, are eligible for a transitional worker status of three years and would be granted employment authorization and permission to travel, and would be eligible to adjust become permanent residents.

S. 2010 also would promote family unity by reducing visa processing backlogs for family-based green cards. Such reforms would allow spouses and children currently caught in bureaucratic delays to come to the United States and would provide these new immigrants with work authorization.

- *The President's Proposal*: The Administration's reform proposal is centered on an uncapped temporary worker program intended to "match willing foreign workers with willing U.S. employers when no Americans can be found to fill the job." The program would grant participants temporary legal status and authorize working participants to remain in the U.S. for three years, with their participation renewable for an unspecified period. Initially, the program would be open to both undocumented people as well as foreign workers living abroad (with the program limited to those outside of the U.S. at some future, unspecified date). American employers would have to make reasonable efforts to find U.S. workers. Under the proposal, participants would be allowed to travel back and forth between their countries of origin and "enjoy the same protections that American workers have with respect to wages and employment rights." The proposal also includes incentives for people to return to their home countries and calls for increased workplace enforcement as well as an unspecified increase in legal immigration.

While these and other general provisions of the plan are known, little is clear. What is clear is that the President is not pushing his proposal and no one is working on introducing it in Congress. It is also unknown if the proposal would create meaningful access to green card status because, while it would not prohibit temporary workers from applying for LPR status, it would allow them to do so only under existing immigration law. The question thus remains whether the Administration's plan would adequately deal with the administrative bars and grounds of inadmissibility that currently prevents many individuals from obtaining legalized status. It also is unclear if the President's proposal adequately addresses other major concerns such as the long backlogs in legal immigration. The proposal would allow temporary worker program participants who seek to remain in America to pursue citizenship, and calls for a "reasonable increase in the annual limit of legal immigration" for others who seek to immigrate to this country. These temporary workers would be placed in line behind those already in line. However, unless current law is changed, the process to become a legal permanent resident could take decades for these temporary workers. Finally, the proposal is silent on the pressing issue of family backlog reductions. The current immigration system is characterized by long backlogs that keep close family members separated for as long as 20 years.

Contact your AILA attorney to find out more about the comprehensive immigration reform bills and how your company can help make comprehensive immigration reform a reality. ♦

**Renewed Congressional Debate over L-1 Visa Program: Business Support Critical**

International companies (both U.S. and foreign based) are commonplace in today's economy, and our immigration

system reflects, and needs to reflect, this global reality. L-1 visas for intracompany transferees help foreign-based companies, many encouraged by our nation's Governors, to open operations in the U.S., generate products and services tailored to the American market, and create jobs for American workers. Likewise, U.S.-based companies bring in their international personnel with knowledge of foreign markets to increase their presence abroad and tap into new markets, and in the process also create jobs in the U.S.

The L-1 intracompany transferee visa program last year fell under attack due largely to a select number of allegations the media highlighted. As a result, lawmakers introduced four bills that would restrict the L visa program, and the Senate Judiciary Committee held a hearing in February to discuss the L visa. At that hearing, Subcommittee members received a clear message that the L visa program is a vital tool for the creation and preservation of American jobs and that any changes to the visa program must be made with a scalpel, not a sledgehammer.

After the hearing, Subcommittee Chairman Saxby Chambliss (R-GA) introduced S. 1635, the L-1 Visa (Intracompany Transferee) Reform Act of 2003. If modification to the L program is necessary, S. 1635, in contrast to other measures, is the least restrictive option available. S.1635 would clarify visa eligibility requirements and sponsor obligations without diminishing the positive attributes of the program or destroying the unique purpose of the L visa category. Specifically, the language would target L-1B visa holders and prevent them from being stationed primarily at the worksite of a third party in cases where they would not be controlled and supervised by the petitioning employer, or where their placement at the third party site was 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.

Despite the Senate's positive treatment of the L visa, negative sentiment resurfaced again in the House of Representatives during a February hearing. The title of the House hearing, "L Visas: Losing Jobs Through Laissez Faire Policies?" announced that this hearing, the first in a series of hearings, was not balanced on the issue. Most troubling was the level of confusion displayed by committee members about the differences between the L-1 visa and the H-1B visa, the erroneous linkage of the L visa to current outsourcing, and the failure to recognize that the L-1 visa has increased foreign investment and created American jobs. Several committee members spoke in favor of proposed legislation that could potentially apply numerical limits, prevailing wages, labor certification and a reduced length of stay to the L visa program.

Any legislation seeking to reform the L visa program must follow the lead of S. 1635 and include provisions that recognize that the L program as a vital tool for U.S. companies that have an international presence, and international firms looking to expand their offices to the U.S. If Congress unnecessarily limits the legitimate use of this visa program, both foreign investment in the U.S. and the work of international companies based in the U.S. would be impeded, with the consequence that American jobs would be lost rather than protected.

International businesses that utilize the L visa are in a unique position to elucidate their Senators and Representatives as to how employers use the L visa and the contributions this program makes. Contact your AILA attorney for more information on how to support this valuable visa. ♦

## AGENCY UPDATE

**USCIS Hikes Visa Processing Fees**

The Bureau of Citizenship and Immigration Services (USCIS) issued final regulations on April 15 to increase the cost of immigration applications and petitions. The fee hike of roughly $55 per petition represents the largest increase in six years and will go into effect on April 30. According to the Department of Homeland Security (DHS), "[a]pplications or petitions mailed, postmarked or otherwise filed on this date require the new fee."

USCIS has stated that the new fees are needed to pay for added security measures and to reduce processing times. However, due to proposed cuts in the bureau's discretionary funding for fiscal year (FY) 2005, USCIS will have to turn to the revenue generated from the petition fee increases to support its current adjudication levels. The administration's proposed budget for FY 2005 only requests $140 million for USCIS discretionary funding—a 41% reduction from the inadequate $236 million included in the Administration's proposed FY 2004 budget. If the administration is serious about eliminating the backlog and reducing processing times, it will have to appropriate sufficient funds for USCIS.

At a time when the quality of service is at an historic low, fee increases of this magnitude are difficult to justify. Many businesses already are paying an additional $1,000 premium processing fee to ensure that visa petitions will be processed in a timely manner. Those businesses unable to afford the hefty additional fee face processing times of several months. Meanwhile, the agency has increased markedly frivolous requests for information that delay adjudications and waste precious resources.

As USCIS loses files, errs on more and more applications, and provides no viable avenue to resolve problems, lawsuits to force action have increased. Adding insult to injury, the fee increase would force applicants to pay for these failures. The proposed budget for USCIS factors the costs of these suits into the fees by proposing a surcharge to pay for them. The Equal Access to Justice Act mandates that government agencies pay certain costs when they take a substantially unjustified position in litigation. USCIS proposes to evade this law by forcing the very people who are harmed by its actions or inaction to pay the costs of the agency's unjustified positions.

Making matters worse, the USCIS has cut off direct phone access to the Immigration Information Officers (IIOs), who had the ability to address problems and questions, including emergency case problems, and has instead established a contractor-run 800 number that has proven to be unable to address these issues. The Department also has announced that it intends to outsource the IIO function and factors into the proposed fee increase the cost of conducting an expensive study of this problematic initiative. Despite numerous problems associated with contracting out the deeply flawed 800 number system, the USCIS budget would mandate that applicants pay the costs of this study to expand this failed concept to cover all user assistance functions.

Starting with FY 2006, USCIS will adjust the immigration fees at the start of each fiscal year based upon the inflation level. USCIS plans to announce each year's new fee schedule through a notice published in the Federal Register.

Administration sources have stated their goal of covering processing costs wholly with fee revenue. Such an initiative recognizes neither current challenges nor realities, and goes in the wrong direction. Direct congressional appropriations are needed to supplement user fees: USCIS adjudications and security checks are in the national interest and such appropriations are necessary to ensure a rational and predictable funding stream.

Contact your AILA attorney for more information on when the fee increases will take effect, and what steps you can take to alert Congress to the need for appropriating adequate funding for the processing of immigration petitions. ♦

**US-VISIT Creates New Hoops for International Personnel**

Despite the variety of visa programs that companies may use to bring foreign clients and international personnel to the U.S., all of these foreign nationals must enter through the U.S. border at a port of entry. And since January 5, that has meant that many of these foreign nationals have had to navigate through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. Given that the Department of Homeland Security has disseminated limited material to travelers on US-VISIT, it is very important that companies fully understand the parameters and challenges of this program and relay that information to their international personnel.

US-VISIT currently is operational at 14 seaports and 115 airports across the country and expansion is expected to continue throughout 2004. Unless Congress acts to delay the implementation deadlines, DHS will be required by law to expand the entry-exit program to the top 50 high traffic land border ports by December 31, 2004, and to the remaining ports of entry by December 31, 2005.

Through the use of US-VISIT, border inspectors will record the entry of nonimmigrant visa holders traveling to the United States. Nonimmigrant visa holders entering at one of these ports will each undergo the standard inspection process and simultaneously will be processed through the US-VISIT system. US-VISIT processing consists of having two inkless fingerprints and having a digital photograph taken. Glasses and other image obstructing accessories can not be worn for the picture.

While no major delays associated with US-VISIT were reported during the first few months of US-VISIT operations, delays are anticipated as travel volume increases. Also, employers must make sure that their international personnel understand that now that US-VISIT is operational, the determination of foreign travelers' admissibility into the U.S. will be partially based on their compliance with its entrance and exit requirements.

Only those nonimmigrant visa holders departing from the Baltimore-Washington International Airport and the Miami Seaport will be required to complete departure procedures before leaving the United States. Although DHS has indicated that it intends to be flexible with these departure requirements in the early stages of US-VISIT, ambiguity regarding this flexibility concerns many immigration attorneys.

At this time, US-VISIT only applies to nonimmigrant visa holders at designated airports and seaports. Legal permanent residents, Mexican laser visa holders, visa waiver program (VWP) participants and Canadian citizens entering the United States without a visa will not be enrolled in the program. Beginning September 30, VWP participants will have to enroll in US-VISIT.

Questions remain as to whether DHS has enough time and funding to properly expand the program. A government task force determined that a fully developed, operational entry-exit system would require extensive additions to existing ports' infrastructure in order not to impede the flow of traffic and goods. Proper implementation is also expected to cost billions of dollars.

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. ♦

**H-2B Cap Hit, Legislation to "Save Summer" Pending**

The U.S. Bureau of Citizenship and Immigration Services announced on March 10 that it had received enough petitions to meet the annual H-2B cap and would no longer accept any new petitions for the visa program. The announcement came just six months into FY 2004 and threatens to devastate local economies that are dependant upon the extra manpower provided by H-2B workers.

H-2B workers perform non-agricultural seasonal tasks essential to the American economy and the economies of communities across this nation. H-2B workers include restaurant, landscape, food production, and hotel service workers. H-2B workers also fill seasonal niche occupations including flying and repairing helicopters designed to fight summer forest fires, filleting fish for foreign markets, and completing the rosters of minor league baseball and hockey teams. H-2B workers receive visas only after employers show they are unable to secure enough U.S. workers to fill jobs.

Employers of H-2Bs are vocally lobbying Congress for an emergency fix to the H-2B cap in order to "Save Summer" and several bills have been introduced in both the Senate and the House.

• The "Save Summer Act of 2004" (S. 2252/ H.R. 4052), introduced on March 22 in the Senate by Senators Kennedy (D-MA), Snowe (R-ME), Leahy (D-VT), Gregg (R-NH), Jeffords (IVT), Murkowski (R-AK), Sarbanes (D-MD), Collins (R-ME), Murray (D-WA), Stevens (RAK), Edwards (D-NC), McCain (R-AZ), Daschle (D-SD) and Sununu (R-NH), and in the House by Representatives Delahunt (D-MA), Young (R-AK), Gilchrest (R-MD), Simmons (R-CT), Allen (D-ME), Van Hollen (D-MD), Serrano (D-NY), Bordallo (D-GU), Jones (R-NC), Ortiz (D-TX), and Cannon (R-UT), would increase the H-2B cap for fiscal year (FY) 2004 by 40,000 visas and would implement reporting requirements similar to those mandated for the H-1B program.

• The "Summer Operations and Services (SOS) Relief and Reform Act (S. 2258), introduced on March 30 by Senators Hatch (R-UT), Chambliss (R-GA), Allen (R-VA), Gregg (R-NH),Warner (R-VA), Murkowski (R-AK), Collins (R-ME), and Thomas (R-WY), would require the Department of Homeland Security (DHS) to "carve-out" from the cap any H-2B visa holders and applicants for this fiscal year who had obtained an H-2B visa in the previous two fiscal years. Although a speedy solution is imperative, how DHS would implement this fix is unclear.

• H.R. 4041, introduced on March 25 by Representative Bob Goodlatte (R-VA), would provide that H-2B employers who employed H-2B workers last year be granted access to the same number of H-2B workers for this fiscal year. Employers concerned with this legislation cite the fact that this proposal would favor established employers who had previously relied on H-2B workers and would fail to recognize the growth of businesses or the establishment of new businesses.

Despite the introduction of these bills, there is not yet a consensus in the Senate about how to proceed and time is growing short. Without an immediate increase in the H-2B cap for the current fiscal year, businesses across the nation that depend upon the availability of a summer workforce will suffer dramatically. A quick fix is needed and must be followed in the next fiscal year by a more lasting solution that can be achieved only through comprehensive immigration reform.

For more information on how to reach out to Congress for an H-2B emergency fix, contact your AILA attorney. ♦