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

Pro-Business Immigration Laws Enacted

President Bush on May 11 signed into law the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005" (P.L. 109-13). This new law includes several pro-business immigration provisions that are outlined below. Contact your AILA attorney for information on how your business can take advantage of these new laws:

H-2B Emergency Relief: The Save Our Small and Seasonal Businesses Act of 2005 (S. 352) was added to the emergency appropriations bill by a landslide vote of 94-6 in the Senate and remained in the final bill that Congress passed and the President signed into law. This measure will provide needed, albeit limited, relief for this fiscal year and next by exempting from the cap H-2B workers who used the program during one of the past three years. Provisions in the act require that this exemption be implemented by DHS within 14 days of enactment, and DHS is fulfilling this mandate. Speedy implementation is essential to provide relief to the small and seasonal employers who have been unable to hire needed workers for the upcoming summer and fall seasons.

In exchange for the temporary relief from the cap, the Act also permanently changes some aspects of the H-2B program including: creating a $150 anti-fraud fee; reallocating the 66,000 H-2B cap so that no more than 33,000 visas can be used during the first 6 months of the fiscal year; increasing sanctions for employers who misuse the program; and requiring DHS to submit to Congress reports on H-2B program usage as well as statistics about the countries of origin of, occupations of, and compensation paid to H-2B workers.

For more information on the implementation of the new H-2B law, see the Spotlight article in this issue of Connect!

New Temporary E-3 Visa for Australian Nationals: The Senate also added language to the supplemental that creates a new temporary E-3 program for Australian nationals performing services in a specialty occupation. Unlike other E visa programs, this E-3 category will require a labor attestation and be annually capped at 10,500, not including spouses and children. The language did not specify an effective date and DHS has yet to release information on when this program will become operational.

IN THIS ISSUE

Recapture of Unused Employment-Based Visa Numbers: As modified and

passed by Republican House and Senate conferees behind closed doors, this provision will recapture unused employment-based immigrant visas by placing those unused from fiscal years 2001-2004 in a "bank" to be used in future fiscal years when the demand for employment-based immigrant visas in the EB-1, 2, and 3 categories exceeds the annual quota. The total number of visas that may be used from the "bank" is limited to 50,000 and these are reserved for immigrant worker petitions based on Schedule A immigrants (Nurses, Physical Therapists, and Performing Artists of Exceptional Ability) and their family members.

The original language of this amendment, offered in the Senate by Senators Schumer (D-NY), Hutchison (R-TX) and Kennedy (D-MA), would have made available all the unused numbers from 2001-2004 and would have allocated 50% of the available numbers to Schedule A occupations and the remaining 50% to other professions. ■

Comprehensive Immigration Reform Bill Introduced

Current immigration law largely prevents U.S. employers from hiring foreign essential workers. Newly introduced comprehensive immigration reform legislation would take a large-scale approach toward fixing our broken immigration system and replacing it with policies that facilitate the employment of essential workers by U.S. companies and organizations.

On May 12, 2005, Senators John McCain (R-AZ) and Edward Kennedy (D-MA), and Representatives Jim Kolbe (R-AZ), Jeff Flake (R-AZ), and Luis Gutierrez (D-IL), introduced the Secure America and Orderly Immigration Act of 2005 (S. 1033/H.R. 2330). Reflecting the universal consensus that our immigration system is broken, S. 1033/H.R. 2330 would reform our immigration laws so that they would enhance our national security and address the concerns of American businesses and families. The legislation would go a long way toward addressing the problems that have plagued our current immigration system. Among other things, it would:

Establish a "break-the-mold" new essential worker visa program (the H-5A visa). The H-5A visa program would be capped initially at 400,000, with the annual limit gradually adjusted based on demand in the preceding year. Unlike any other visa program, the H-5A visa would not be tied to an employer. Applicants would qualify for visas by demonstrating the availability of a job in the U.S., paying a $500 fee in addition to application fees, and clearing all security, medical, and other checks. The employer would not have to pay for the visa process, and the workers would be able to change jobs without applying for a new visa. The H-5A visa would be valid for 3 years, and could be renewed once for a total authorized stay of 6 years. At the end of the visa period, the worker would have to return home or be in the pipeline for a green card. Employers would be able to sponsor the H-5A visa holder for permanent residence or, after accumulating 4 years of work in H-5A status, workers could apply for a green card through self-petition.

The bill also sets forth various employer obligations and worker protections and an enforcement scheme to deal with violations of these provisions. In addition, the bill creates a task force to evaluate the H-5A program and recommend improvements, and requires updating of America's Job Bank to ensure that American workers first see posted job opportunities.

Provide a mechanism by which eligible undocumented immigrants present in the U.S. on the date of the bill's introduction can adjust to temporary nonimmigrant (H-5B) status with a stay of 6 years. Under this program, applicants would be required to undergo criminal and security background checks, submit fingerprints and other data, pay a fine, and establish a previous work history in the U.S. Spouses and children would also be eligible for adjustment under this section. The bill provides a subsequent mechanism by which H-5B nonimmigrants could then work to obtain a green card by meeting a prospective work requirement, paying a fine, and fulfilling additional eligibility criteria. Children and spouses would again be eligible for such adjustment.

Promote circular migration patterns. This bill would authorize the establishment of labor migration facilitation programs with foreign governments whose citizens participate in the new temporary worker program. The programs would facilitate the flow of foreign nationals to jobs in the U.S., with an emphasis on encouraging the re-integration of foreign nationals returning to their home countries; and encouraging the U.S. government to work with Mexico to promote economic opportunities for Mexican nationals in their home country to reduce migration pressures and costs.

Promote family unity and reduce backlogs. By increasing the number of employment-based green cards available each year and allowing more family members a legal channel by which they can reunite in America and

obtain their green cards, the bill would combat the incentives for illegal migration.

Enhance immigration enforcement. The bill would mandate a new Employment Eligibility Confirmation System which would gradually replace the existing I-9 system, and which would contain certain safeguards to prevent the unlawful use of the system as well as a process by which individuals could correct false information. The bill also would expand the Department of Labor's investigative authority to conduct random audits of employers and ensure compliance with labor laws, and include new worker protections and enhanced fines for illegal employment practices. In addition, the bill would deter fraud by requiring all new visas issued by the Secretary of State and immigration-related documents issued by the Secretary of Homeland Security to be biometric, machine-readable and tamper-resistant, within 6 months of the bill's enactment.

Create a national strategy for border security and enhanced border intelligence. The legislation would enhance our national security by mandating the development and implementation of various plans and reports dealing with information-sharing, international and federal-state-local coordination, technology, anti-smuggling, and other border security initiatives; authorizing the development of a Border Security Advisory Committee made up of various stakeholders in the border region to provide recommendations to the Department of Homeland Security regarding border security and enforcement issues; and requiring the Secretary of State to provide a framework for better management, communication and coordination between the governments of North America, including the development of multilateral agreements to establish a North American security perimeter and improve border security south of Mexico.

The Secure America and Orderly Immigration Act of 2005 has the necessary elements of comprehensive immigration reform to significantly curb illegal migration by providing new legal channels for workers to enter the country when employers are unable to find U.S. workers, bring existing undocumented workers in the U.S. out of the shadows and allowing them an opportunity to earn legal status, and by removing the bureaucratic hurdles that prevent close family members from reuniting. These elements recognize the value of immigrant workers and are good for American business.

For more information on how comprehensive immigration reform could benefit your business, be sure to contact your AILA attorney. ■

Employment Verification Programs Proposed

Most U.S. employers view the current I-9 employment verification process with a mix of confusion and ill-regard. Under this scheme, newly hired employees must present certain documents, from a list of those deemed acceptable, to demonstrate that they are authorized to work. Determining if a document is valid is the responsibility of employers who must diligently try to verify work authorization without over-reaching and thereby violating anti-discrimination protections designed to protect workers.

In an effort to find a more reliable and streamlined process to determine work authorization, U.S. Citizenship and Immigration Services (USCIS) (in conjunction with the Social Security Administration (SSA)) currently operates a web-based pilot program (the Basic Pilot Program) which allows employers to receive an automated confirmation of a newly hired employee's work authorization. At this point, employers still are required to complete the Employment Eligibility Verification form (Form I-9). This voluntary pilot program is available in all 50 states. However, studies of the program indicate that improvements are needed in the program that would increase accuracy of the data and interoperability of the databases used by the program. According to a June 2004 DHS issued report, the initial confirmation rates for foreign-born workers who are, in fact, work authorized was only 48.8%.

Despite the problems already evident in the current voluntary program, some Members of Congress are supporting a mandatory employment verification program. On one hand, forward-looking comprehensive immigration reform bills are turning to this type of system to eventually replace the I-9 system. In this context, the employment verification program would include database accuracy standards, and a new temporary worker program, a means for current undocumented workers to earn a legal status, and a safe harbor for employers.

In contrast with this approach, Representative David Dreier (R-CA) has proposed enforcement-only legislation that would create a new biometric tamper-proof social security card and a nation-wide, non-voluntary employment eligibility database. Non-compliance with the program could cost employers up to $50,000 per violation. While Representative Dreier's bill, the "Illegal Immigration Enforcement and Social Security Protection Act of 2005" (H.R. 98) is designed as a means to eliminate the influx of undocumented workers by

removing the "jobs magnet," it fails on several counts.

First, this enforcement-only measure would not provide employers with a legal channel for future workers. (Representative Dreier has verbally stated that he would support the use of a guest worker program in conjunction with this proposal. However, there is no affirmation of this view in the bill's lengthy Sense of Congress section.)
Secondly, the workability of this employment verification system is predicated on the erroneous assumption that social security issuance to foreign nationals is an expedient process. As most employers know from experience, many foreign nationals often have to wait for weeks to obtain a social security card.

Thirdly, the bill does not include a safe harbor for employers who use the program, or any privacy restrictions for employers. Nor does the bill require that the information in the informational databases be accurate and updated in a timely manner.

Finally, privacy experts have testified that this bill would turn the SSN into a de facto national identifier and could increase the risk of identity theft. ■

AGENCY UPDATE

DHS Implements New H-1B Exemption

Employers wishing to hire highly educated foreign professionals through the H-1B visa program should be aware that, on May 12, the U.S. Citizenship and Immigration Services (USCIS) began accepting new FY2005 H-1B petitions in accordance with the relief provided by the H-1B Reform Act of 2004 (included as part of the Omnibus Appropriations Act for Fiscal Year 2005 (P.L. 108-447)). This law added a new exemption to the 65,000 H-1B numerical cap for foreign nationals who graduate with an advanced degree from a U.S. university. This exemption from the general H-1B cap is limited to 20,000 visas per year.

The limited relief included in the H-1B Reform Act of 2004 is inadequate and will likely be exhausted prior to the end of the fiscal year. Anticipating that employers will file more H-1B exemption petitions than there are visas available, USCIS indicated in its implementation guidance that it will automatically convert, unless notified otherwise, any petition processed after the 20,000 limit is reached as a FY2006 petition. For these petitions, the foreign nationals will not be able to begin work pursuant to their H-1B visas until October 1, 2005, the first day of FY 2006.

As the U.S. economy improves and demand increases, U.S. employers will need increased access to these highly educated foreign professionals. America's economy will be hurt without U.S. employers' access to these professionals. In the short term, limited access would prevent employers from fully utilizing the special skills of these highly educated foreign professionals. In the longer term, bars to access to these professionals would limit their participation in the U.S. labor force, thereby hampering our economic vitality. The result will be American jobs lost and American projects losing out to foreign competition. Congress needs to support an H-1B program that reflects our nation's need for these professionals and allows U.S. employers' access now and in the future to the talents of these highly educated foreign professionals.

Actions employers take to alert Congress to the importance of this issue are key to future H-1B relief. For more information on how your company can get involved now, contact your AILA attorney. ■

Important Changes to the Visa Waiver Program

In today's global marketplace expedient travel for international personnel and clients is vital. Frequently, travelers coming to the U.S. for meetings, business deals, or conferences take advantage of the visa waiver program (VWP). This program allows citizens of 27 countries, mainly located in Europe and Asia, to travel to the U.S without a visa for purposes of business or pleasure. However, upcoming changes will make this program harder to use for certain travelers. U.S. businesses should note these changes in order to ensure that international personnel or clients remain eligible for this program.

On June 26, 2005, all persons traveling under the VWP program must present a machine-readable passport (MRP) for entry to the U.S. If a VWP participant fails to present a MRP at the port of entry, the traveler will be turned away and the airline carrier on which she or he arrived will be fined $3,300. This fine, in effect, will make airlines enforcers of the law.
The MRP requirement officially went into effect October 26, 2004, but the

Department of Homeland Security (DHS) granted inspections officers the discretion to issue non-complying individuals a one-time exemption. That discretion period will end on June 26.

Individuals without a machine-readable passport will not be able to utilize the VWP after June 26 and will first have to obtain a visa at the U.S. consulate. This extra step could delay a trip to the U.S. by weeks, if not months. However, reports indicate some countries have decided to issue MRPs at departure airports.

Employers also should be aware that in addition to the MRP requirement, a separate biometric passport requirement is set to go into effect for Visa Waiver countries this October. Once this requirement is in place, citizens of countries that lack biometric passports would no longer be able to utilize the VWP. A few countries, for example Belgium, have indicated that they will be able to meet this deadline. However, the majority of Visa Waiver countries, particularly countries like Great Britain and Japan with a high volume of VWP travel to the U.S., have indicated that they are unable to meet this deadline. The result of Congress not extending the biometric passport deadline will be a massive increase of visa applications at the U.S. consulates. Such a massive increase will slow down visa issuance for all visitors, workers, and family members from impacted countries.

For more information on how upcoming changes to the Visa Waiver Program will affect your business, please contact your AILA attorney. ■

US-VISIT Expands Exit Facilities

All foreign nationals traveling to the U.S. with a visa or pursuant to the visa waiver program must enroll in the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. For U.S. businesses, this means that no matter your industry or the size of your company, if you deal with foreign nationals at any stage in your business cycle, you are dealing with US-VISIT.

Mandatory enrollment in US-VISIT currently takes place at 115 airports, 14 seaports, and at the 50 busiest land ports. Enrollment consists of the traditional inspections process plus scanning a traveler's documents, and using the index finger prints of both hands and a digital photograph to confirm a foreign national's identity. Information also is collected on immigration and citizenship status, nationality, country of residence, and residence while in the United States.

Recording an exit through US-VISIT also is mandatory where the exit facilities are operational. Although exit registration is self-directed, it is very similar to the entry process. The traveler must input his or her departure information, visa data and fingerprints into the US-VISIT system—either via a US-VISIT kiosk or with a US-VISIT official with a portable US-VISIT device. In both cases, travelers will be given, and should retain, receipts. US-VISIT exit procedures currently are being piloted at the following ports: Baltimore/Washington International Airport, Chicago O'Hare International Airport, Dallas/Fort Worth International Airport, Denver International Airport, Detroit Metropolitan Wayne County Airport, Hartsfield-Jackson Atlanta International Airport, Long Beach and San Pedro seaports near Los Angeles, Luis Muñoz Marin International Airport in San Juan, Puerto Rico, Miami International Cruise Line Terminal, Newark Liberty International Airport, Philadelphia International Airport and San Francisco International Airport, and, most recently, the Seattle-Tacoma International Airport

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. ■

Temporary H-2B Relief Goes into Effect

On May 25, 14 days after the enactment of the "Save Our Small and Seasonal Businesses Act of 2005," the Bureau of Immigration and Citizenship (USCIS) resumed processing H-2B petitions for FY2005. Speedy implementation of this legislation by USCIS and the U.S. consulates abroad will help ensure that small and seasonal businesses who can not find American workers have access to workers needed during peak seasons. For some businesses, obtaining these essential workers will make the difference between having a successful year or having to cut back on services or even close their doors.

This short term relief came about because employers contacted their Members of Congress and sent clear and consistent messages about the need for these workers. Such efforts will be necessary to achieve a longer term fix (see below). USCIS is now accepting petitions for two types of H-2B workers: returning workers who have used the program during one of the past three years and new H-2B workers eligible to fill about 35,000 new slots available under the FY2005 cap. Despite the significant number of capped numbers now made available, it is important that employers make use of the returning worker category slots wherever possible.

The new law mandates that returning workers are exempt from the restrictive 66,000 H-2B cap for fiscal years 2005 and 2006. To take advantage of this exemption, employers must name the returning worker and certify that he or she has used the program within the past 3 years. It is important to note that the worker does not have to have a work history with the petitioning employer. For employers who are in a hurry, a $1,000 premium processing fee will guarantee a response from USCIS in 15 days—either in the form of a request for additional evidence, an approval or a rejection.

After the petition is approved, the H-2B worker must prove to the U.S. consulate that he or she held H-2B status within the past three years. The State Department maintains a database that will help to identify returning workers, and individuals included in this database should not have to provide any additional proof of returning worker status. By contrast, H-2B visa applicants not included in the database will need to provide evidence of their former status. Workers who are visa exempt (for example Canadians) will have to present their returning worker evidence to an immigration inspector at a port of entry.

Small and seasonal employers are fortunate that H-2B legislation has been quickly passed and implemented. However, this temporary relief from the cap does not take the place of a permanent solution. Congress must pass a comprehensive immigration reform package that provides employers with adequate access to short-term and longer-term essential workers. Reform must alleviate the current strain on the H-2B program and create other visa programs that would provide a long lasting solution for employers. Clear, streamlined, and efficient programs would match willing workers with willing employers and help America's small and seasonal companies stay open for business.

For more information on how to take advantage of the H-2B processing and to get involved in working towards a permanent solution, contact your AILA attorney. ■