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

Attack on L visas Continues, Restrictive Bill Introduced

Selected members of Congress over the past year have attacked the L visa for intracompany transferees. Six bills have been introduced that would restrict the L visa in a misguided effort to preserve American jobs. Ironically, the L visa category which, at its peak usage in Fiscal Year 2001 accounted for only 65,000 visas, has proven to be an essential vehicle for job creation and business investment in the U.S.

The latest attack on the L visa came in the form of legislation introduced on May 20 by Representative Henry Hyde (R-IL). The Save American Jobs through L Visa Reform Act of 2004 (H.R. 4415) would eliminate the L-1B visa category for intracompany transferees with specialized knowledge.

The L visa program is divided into two categories: the L-1A visa for executive or managerial positions and the L-1B visa which requires employees to possess specialized or advanced knowledge that generally is not found in the particular industry. Since their creation in 1970, both the L-1A and the L-1B visas have been essential vehicles for job creation and business investment in the U.S. Through the L-1B visa program, large and small companies have brought to the U.S experienced personnel with specialized knowledge from their operations abroad to expand business operations here and transfer proprietary skills and knowledge to their U.S. workforce. Eliminating the L-1B category would prevent the U.S. from obtaining these benefits. American jobs would suffer as a result.

In addition to eliminating the valuable L-1B category, this overreaching legislation would place a numerical cap of 35,000 per fiscal year on the L-1A visa category and strip from L visa holders the ability to obtain and maintain L status while simultaneously pursuing legal permanent resident status. H.R. 4415 also includes a sense of Congress that employers should pay L-1 visa holders the greater of the prevailing wage or the actual wage paid to similar employees.

IN THIS ISSUE

This bill follows a February 3, 2004 hearing on the L visa convened by Representative Hyde in his capacity as chairman of the House International Relations Committee. The hearing presented an unbalanced view of the L-1 visa category with panelists consisting

primarily of witnesses who supported restricting the visa.

By unnecessarily restricting the L program and eliminating the L-1B category, Representative Hyde's bill fails to recognize the importance of the L-1 visa as a tool to increase foreign investment and create American jobs. Instead of overreaching restrictions on the L-1 category that would hurt American workers and employers, the L-1 visa program needs narrowly tailored reform. Legislation introduced earlier by Senator Saxby Chambliss (R-GA) (S. 1635) includes appropriate reform: It would require that L-1B visa holders be controlled and supervised by the petitioning employer and, if required to perform services at a third party worksite, such services would involve the use of specialized knowledge specific to the petitioning employer.

It is important for employers who utilize the L visa to contact their Members of Congress to urge their support for this vital visa. The best way to support the L visa category is to explain how these intracompany transferees are vital to business operations in the U.S. and how companies' access to L visa holders helps to create jobs for American workers. Contact your AILA attorney for more information on how to protect this important visa category. ♦

Congress Holds Hearings on USCIS Backlogs

The delays and backlogs that employers have had to contend with that plague the Bureau of Citizenship and Immigration Services (USCIS) at the Department of Homeland Security (DHS) have made it very difficult for businesses seeking to bring in their overseas personnel, hire foreign talent to augment their U.S. workforce, and/or extend or change the status of current foreign workers. These backlogs also have deterred some of the world's brightest minds from studying at U.S. institutions. Recognizing the need to reduce these backlogs, the House Judiciary Committee's Subcommittee on Immigration, Border Security and Claims recently held two oversight hearings that focused on these delays.

USCIS Director Eduardo Aguirre testified at the first hearing on June 17. His testimony focused on the Administration's goal of "eliminat[ing] the backlog and ensur[ing] a six-month or less processing time by the end of 2006." Although USCIS has already made some progress towards making the application process more expedient, reducing the backlog remains a daunting challenge. Mr. Aguirre testified that the USCIS backlog elimination plan has three basic elements: "(1) Achieve a high-level of performance by establishing clear, concrete milestones and actively monitoring progress towards these milestones; (2) transform business practices by implementing significant information technology improvements and identifying processing improvements to transform the current way of doing business; and (3) ensure integrity by instituting comprehensive quality assurance measures." Despite the challenges USCIS is undertaking, Mr. Aguirre repeatedly denied the need for additional funds to accomplish this backlog reduction.

The second hearing, held on June 23, emphasized the impact of backlogs on business and families. Witnesses included AILA President, Paul Zulkie, who focused his testimony on the consequences of these backlogs: "Through no fault of their own, families remain separated, businesses cannot acquire the workers they need, doctors with life-saving skills are prevented from entering the country, skilled professionals who are sought by American business to create American jobs remain stranded abroad." Furthermore, he added, "backlogs not only harm the people directly caught in their web, they undermine public trust in the immigration system."

These backlogs have especially negative consequences on commercial operations, compromising of our nation's ability to attract top tier international talent and imposing undue costs on companies. Such negative consequences are best illustrated by a concrete example. For instance, one of the top 10 U.S. medical centers was forced to lay off one of its best surgeons because the USCIS was taking five months to renew his work authorization card, even though USCIS's own regulations require that these cards be processed within 90 days. The hospital, the surgeon and his patients all suffered from his forced unavailability.

This example highlights the two types of delays that occur at USCIS. The first type of delay occurs when visa applications sit on a shelf with no review by an adjudicator. The second type of delay or "hidden" backlog (so named because the agency does

not take account of it) results from slowdowns caused by security checks, when an adjudicator requests additional evidence, or when a case is shifted to the Administrative Appeals Office (AAO) for review. Individuals stuck in the backlog are victims of both.

USCIS has taken some steps in the right direction to deal with these delays including: issuing instructions discouraging the readjudication of established facts; storing biometrics on file; creating *InfoPass*, the on-line appointment system that has been implemented in three of USCIS's busiest districts; allowing applicants to check the status of their cases on line; and the soon to be issued regulation that will allow the agency to issue work authorization cards for validity periods that are more in line with the actual time needed. However, it is unclear how effective these measures will be without funding beyond the user fees to support them.

Unfortunately, not all of USCIS's initiatives have helped decrease the backlogs. In fact, some have been setbacks. Hopefully, the bureau will recognize when a reform has failed or when one needs further work, and either abandon the idea or make the necessary changes. Some initiatives that need revisiting include the following:

Electronic filing. The movement to e-government is admirable, but care must be taken to ensure that it is not an empty shell that provides no meaningful improvements. Unfortunately, most aspects of the USCIS e-filing initiative have had a negligible impact on the backlog and, with one exception, show little prospect of enhancing efficiency in the two-year time period in which this agency strives to bring its backlogs under control. Under e-filing, forms are filed electronically, but the required supporting documentation must be mailed in separately and then matched with the file, itself creating an additional piece of work. And, more importantly, the process is just e-filing, not e-adjudication: the adjudication process is manual, providing no efficiencies on the processing end where it is most needed. The one possible exception lies in a pilot project in California. The agency there is experimenting with green card replacement applications filed electronically serving as a conduit for direct production of the new card. We urge USCIS to find other similar ways in which the electronic filing can be used meaningfully, such as capturing data for the adjudicator's use.

Decision at first review. This is a prime example of a good idea gone bad. It is important for USCIS to get under control its ever-proliferating volume of Requests for Evidence (RFEs), which are too often multi-page, multi-item demands for documentation that often were either already provided, were not relevant to the application at hand, or were necessitated by the sheer length of time the application sat on the shelf. The volume of RFEs has grown in recent years as adjudicators, nervous about whether they might be criticized for a decision, became increasingly paralyzed and chose to make a show of demanding further documentation before they would approve an approvable case.

USCIS finally addressed these RFEs in recent guidance to the field. However, this guidance unfortunately may make the situation worse instead of better. Failing to tell adjudicators that they can go ahead and approve a case if the documentation is complete, the memo instructs adjudicators to deny cases that previously would have received an RFE. While this instruction will make cases move faster initially, it really does no more than shift parts of the primary backlog to a part of the secondary backlog: the AAO (the Administrative Appeal Office). The AAO already has a backlog measurable in years for some case types, and USCIS is not including AAO in its backlog reduction initiative. Thus, the effect of the "decision at first review" initiative is simply to shift some of the backlog from where it is counted to an office where it will not be counted. That is not backlog reduction—that is hiding the backlog.

National Customer Service Center. This 800 number for customer service must have seemed like a good idea at the time. Give people a toll-free number that they can actually get through on, and improved customer service will result. Unfortunately, it has not worked out that way, particularly with respect to solving problems on applications already on file and with respect to providing misguided and ultimately harmful advice to members of the public. To its credit, USCIS has acknowledged that the 800 number is not a workable means to resolve problems on cases already on file, and has indicated that the agency is working on a solution that would put the problem-solving process back in the hands of the USCIS-

employed personnel. However, this solution has yet to be announced.

Outsourcing the Immigration Information Officer Function. A current Administration initiative may serve to undermine this planned solution. It is important to note that the 800 number is answered by an outside contractor, and that many of the problems that have developed result from the fact that an outside contractor is not fully trained in immigration, is not fully accountable for performance, and does not have access to case files. We understand that the agency is soliciting bids from contractors to privatize the Immigration Information Officer function. If this initiative is successful, the reform of the 800 number may be rendered meaningless, as these functions will again be placed in the hands of contractors who lack the knowledge and information to provide the service on a fully informed basis. Both the 800 number system and the IIO function are inherently governmental activities and should not be contracted out.

Contact your AILA attorney for more information on how the USCIS will implement its plan to reduce backlogs and when these measures may begin to ameliorate the immigration processing times for your business. ♦

AGENCY UPDATE

Department of State to End Visa Revalidations in U.S.

The Department of State (DOS) on June 23 gave notice that it will discontinue its domestic visa revalidation service for certain nonimmigrant visas in the United States. The service is scheduled to end on July 16.

The visa revalidation program currently allows DOS to reissue nonimmigrant visas to foreign government officials and international organization employees as well as foreign nationals working in the C, E, H, I, L, O and P visa classifications.

According to the notice, DOS has decided to discontinue the revalidation service for all visa categories except for certain diplomatic and international organizational visas because of recently increased visa interview requirements and the congressional mandate that requires all U.S. visas issued after October 26, 2004 to include biometric identifiers. According to DOS, the Department would be unable to collect the necessary biometric identifiers in the United States.

So what does the notice mean for your employees?

Who is not impacted: Those foreign national employees, and their spouses or children, who have a valid visa stamp in their passport will not notice any change. In addition, those employees who have extended their visa or changed employers, but do not travel outside the United States, will be unaffected.

Who is impacted: Foreign national employees who are in one of the affected nonimmigrant classifications (C, E, H, I, L, O and P) and travel outside the United State for either work or pleasure will no longer have the option, after July 16, 2004, of asking the State Department to renew their visa stamp here in the United States. Instead, they will have to go to a U.S. embassy or consulate outside the United States to get a new visa stamp. Given the delays associated with visa issuance at U.S. consulates abroad, it is important that foreign national employees contact their AILA attorney before traveling outside of the U.S.

Please consult your AILA attorney for more information on whether or not your foreign workforce would be affected by this new policy. ♦

USCIS Announces H-1B Visa Usage for Fiscal Year 2005

The Bureau of Citizenship and Immigration Services (USCIS) announced that, as of the end of May, a total of 16,100 H-1Bs countable against the fiscal year (FY) 2005 cap of 65,000 either were approved or remain pending. Despite the numbers thus far, experts are still anticipating that the FY 2005 cap numbers will be reached by this Fall.

The restrictive numerical cap on H-1B visas has caused difficulties for many employers seeking to hire foreign professionals. FY 2004's cap of 65,000 ran out just five months into the fiscal year, leaving many employers unable to supplement their U.S. workforce with highly educated foreign professionals. Considering that many of these foreign national professionals with cutting edge skills recently graduated from America's top colleges, the inability to hire such top talent can undermine a U.S. company's competitive edge. Without access to these professionals, companies may be unable to develop new products and services, thereby slowing down the creation of new jobs for U.S. workers. To make matters worse, if these highly educated professionals cannot be hired in the U.S. they will have no choice but to find work abroad with our competitors.

In order to adequately provide U.S. employers with access to these highly educated professionals, the law should be amended to 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 such talent abroad to our competitors.

An exemption also should be created for federal, state and local government workers, including teachers. If a government agency (any federal, state or local government entity, including school districts and federal agencies such as the Center for Disease Control), 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 almost always follow a mandate that makes 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.

Before the numerical cap is hit for this fiscal year, it is very important for employers to continue to contact their members of Congress in support of increasing access to H-1B foreign professionals. These workers help keep U.S. businesses competitive and generate jobs for our workers.

Contact your AILA attorney for more information on how you can help protect access to these vital employees. ♦

SPOTLIGHT

Tool Available for Employers to Contact Congress

Time and money are often the major constraints preventing businesses and employers from calling and visiting their members of Congress. However, it is becoming more important for businesses to reach out to Congress and voice their support for measures that would ensure access to foreign workers.

Clients of AILA attorneys are able to use, through the use of the AILA website www.aila.org, the Contact Congress/Media tool to send letters to their Senators, Representatives, and the White House, as well as to the local media. It takes about 17 seconds to send a letter through this service.

The Contact Congress service allows employers to either compose their own letters or send already drafted letters that highlight AILA's positions on priority issues, including access to H-1B visa holders, the need to preserve the L category and the importance of H-2B visas. Over the past month alone, almost 6,000 letters have been sent to Capitol Hill using Contact Congress. Although this is an impressive start, more letters are needed.

Please contact your AILA attorney for more information on which immigration bills would benefit your business and for more information on how to use Contact Congress. ♦