

# CONNECT!

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

Volume 5, No. 4 July/August 2004

## 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

### Narrow H-2B Relief Passed, Broader Fix Needed For All Seasonal Employers

The U.S. Bureau of Citizenship and Immigration Services (USCIS) last spring announced 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 was met with an immediate outcry from the business community, particularly from those summer employers across the nation who cannot find enough U.S. workers to fill vacant positions and depend upon the extra manpower provided by seasonal H-2B workers.

As a result of the outreach by affected businesses, several positive bills were introduced. However, Senators Jon Kyl (R-AZ) and Jeff Sessions (R-AL) blocked these bills by seeking unacceptable changes in other areas of immigration in exchange for supporting an increase in this year's H-2B numbers. Ultimately, Senator Ted Stevens (R-AK) successfully added an amendment to the 2005 Department of Defense (DOD)

Appropriations Act (H.R. 4613, Pub. L. No. 108-287). However, his amendment is a very limited fix that only would exempt fish roe processors, technicians, and supervisors from the H-2B cap.

Although this narrow H-2B cap exemption is an important success for fish roe industries, it will not help the myriad of other seasonal industries that rely on the availability of H-2B workers to fill seasonal vacancies. These H-2B seasonal workers include restaurant, landscape, food production, ski resort workers, and hotel service workers. H-2B visa holders also fill seasonal niche occupations including flying and repairing helicopters designed to fight summer forest fires, as well as completing the rosters of minor league baseball and hockey teams.

Without relief from a numerical cap limiting the H-2B visa category, it is likely that the 66,000 limit will be reached by or before January 2005, thereby cutting off the supply of H-2B workers for all seasonal employers. In order to ensure that there are enough visas

available this fiscal year, all businesses that utilize the H-2B visa must continue to reach out to Congress for a broader H-2B fix this fall. Contact your AILA attorney for more information on how to let lawmakers know the importance of providing additional H-2B numbers. ■

### IN THIS ISSUE

#### LEGISLATIVE UPDATE

- Narrow H-2B Relief Passed, Broader Fix Needed for All Seasonal Employees..... 1
- Changes to Visa Waiver Program on Horizon..... 2

#### AGENCY UPDATE

- H-1B Cap Numbers Going, Going, Gone?..... 2
- US-VISIT Exit Component Expanding..... 3
- USCIS Launches *InfoPass*..... 4

#### SPOTLIGHT

- 9/11 Commission Report to Impact Immigration..... 4

## Changes to Visa Waiver Program on Horizon

Many businesses in today's global economy depend on the visa waiver program (VWP) for the expedient travel of their international personnel, executives, and clients. Traditionally, the VWP has allowed 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. Typically business travelers will utilize the VWP when coming to the U.S. for emergency meetings, business deals or conferences.

Employers should be aware that the VWP is undergoing several significant changes. Beginning on September 30, 2004, the Department of Homeland Security will begin enrolling VWP visitors in US-VISIT. All VWP participants

should be prepared to have their index fingerprints taken along with a digital photo and their biographical information will be entered into the US-VISIT database. Along with this entry procedure, travelers enrolled in US-VISIT will be required to properly register their exit. (For more information about the exit requirements, see the article below on US-VISIT in this issue of *Connect!*). On October 26, all visa waiver travelers also must present a machine-readable passport for entry to the U.S. Those individuals who do not have a machine-readable passport cannot utilize the VWP and must first obtain a visa at the U.S. consulate. This extra step could delay a trip to the U.S. by weeks or months.

This October also had marked the date by which countries participating in the VWP had to certify that they

were issuing to their citizenry passports that contained biometric identifiers. Travelers who had been issued such a passport would then have to present it for entry into the U.S. under the VWP. However, due to an appeal by the Secretaries of the Departments of Homeland Security and State, and evidence indicating that countries would have been unable to comply with this stringent biometric deadline, Congress passed and the President signed into law (P.L. 108-299) a one-year extension, to October 26, 2005, of these biometric requirements.

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

## AGENCY UPDATE

---

### H-1B Cap Numbers Going, Going, Gone?

Trying to figure out how the H-1B numerical cap works makes most employers feel a bit like Alice in Wonderland. One minute the numerical restriction on this visa category seems gigantic, the next minute the cap seems about right, and then, in the blink of an eye, it has shrunk to an uncomfortably small number that severely restricts employers' access to highly educated professionals.

At the beginning of the current fiscal year, the H-1B cap dropped from 195,000 to 65,000. As a result, many U.S. employers have been unable to hire the

professional staff they need—often recent graduates from the top U.S. universities with Masters and PhD programs in math and the sciences—to develop new products, engage in groundbreaking research, implement new projects, expand operations, create new jobs, and compete in the global marketplace.

Beginning in May 2004, the Bureau of Citizenship and Immigration Services (USCIS) began accepting applications for H-1B workers for the next fiscal year. However recent reports from USCIS indicate that, as of August 4, 2004, over 40,000 H-1B visa petitions have been filed for Fiscal Year 2005 (FY 2005) and 21,000 have been approved. If these rates continue,

it is likely that the H-1B cap numbers for FY 2005 will be used up close to the start of the fiscal year.

#### *Why is This Happening?*

In a number of fields, the total number of graduates with advanced degrees has not kept pace with demand. In addition, a rising percentage of the advanced degrees awarded by U.S. universities in areas of study like engineering, mathematics and computer sciences are to foreign nationals. Under current immigration law, however, many of these graduates are only able to work for U.S. companies if they obtain H-1B visas. However, the current the

numerical cap of 65,000 does not provide U.S. businesses with enough access to highly educated foreign professionals, many of whom are graduates from U.S. universities and represent the best and brightest minds with cutting edge talents.

Complicating matters is the fact that legislation implementing the free trade agreements (FTAs) with Chile and Singapore has effectively reduced the size of the H-1B cap to 58,200 visas per fiscal year—the most restrictive that this cap has ever been. According to the law, any numbers unused under those FTAs at fiscal year's end are added back into the quota, but can only be used for adjudications during the first 45 days of the new fiscal year. Given the bureaucratic delays and inefficiencies inherent in USCIS, it remains unclear if the agency will be able effectively to add back these left over numbers to the overall cap.

#### *What Can Be Done?*

To avoid this H-1B black-out it is imperative that companies contact their members of Congress and let them know that the H-1B visa is a tool to keep the U.S. economy vibrant and jobs in America. Don't let your access to these important H-1B professionals fade away like the Cheshire cat. Contact your AILA attorney for more information on how to fight for access to the H-1B visa category. ■

#### **US-VISIT Exit Component Expanding**

In our last issue of *Connect!*, we reviewed the Department of Homeland Security's (DHS's) new entry-exit immigration monitoring

program, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program. On January 5, the first phase of US-VISIT became operational at 14 seaports and 115 airports across the country. Providing fingerprints and having digital photographs taken upon every entry to the U.S. has become a matter of course for many nonimmigrant visa holders.

Upon exiting the U.S., travelers subject to US-VISIT are required by law to register their departure. However, US-VISIT initially only had two locations with exit components: the BWI airport in Baltimore, MD and the Miami, FL seaport. DHS recently has begun installing the US-VISIT exit components at 13 other air and seaports, beginning with the August 3 installation at the O'Hare airport in Chicago and continuing on with the following airports: Newark, NJ; Atlanta, GA; Philadelphia, PA; Dallas/Fort Worth, TX; Detroit, MI; Seattle, WA; San Juan, Puerto Rico; Phoenix, AZ; San Francisco, CA; Ft. Lauderdale, FL; and Denver, CO. DHS also will expand the US-VISIT exit component to the seaports in San Pedro and Long Beach, CA.

Travelers exiting through one of these ports should be aware that DHS is testing alternative means of recording departures through US-VISIT. At this time DHS is testing out a kiosk-like machine that looks like an ATM, as well as portable exit recorders that are worn by US-VISIT attendants. Travelers may also have to reconfirm their identity with a US-VISIT attendant before boarding their flight.

As part of a new feature, the US-VISIT exit machines will issue each

traveler a receipt which includes the traveler's name, date and time of the exit, terminal and port names where the exit took place, and a receipt number. The receipt also contains encrypted information. While DHS is recommending that travelers keep their receipt until they board the plane, employers should consult with their AILA attorney as to whether their employees should retain their receipts with their permanent travel documents.

Another new feature travelers will notice as they depart the U.S. is the new uniform identifying US-VISIT attendants. The attendants can be identified by their uniforms consisting of a light blue oxford shirt and khaki pants with both the DHS and US-VISIT logos. Each attendant will wear a flag patch for each foreign language he or she speaks. These attendants are not Customs and Border patrol officers; their purpose is to assist travelers with the exit portion of US-VISIT.

As part of its outreach efforts, DHS has developed a US-VISIT informational exit card which will be given out at airports with exit capabilities. These cards are the same size and shape as airline tickets, and are available in a variety of languages. DHS is trying tailor the languages to the specific needs of each airport (i.e. O'Hare will have Polish language cards due to the high number of Polish speakers who fly into that airport.)

For the time-being, US-VISIT only applies to nonimmigrant visa holders at designated airports and seaports. However, beginning September 30, Visa Waiver Program (VWP) participants must enroll in US-VISIT. The program is

mandated to expand to the top 50 high traffic land border ports by December 31, 2004, and to the remaining ports of entry by December 31, 2005. Although not currently addressed in the law, it is feasible that Canadian citizens, Mexican laser visa holders, legal permanent residents, and U.S. citizens also may eventually be subject to enrollment in US-VISIT.

Employers must make sure that their international personnel understand that as US-VISIT expands its operations, determination of foreign travelers' admissibility into the U.S. will be partially based on their compliance with its entrance and exit requirements. Contact your AILA attorney for more information on US-VISIT and how it may affect your international personnel. ■

### **USCIS Launches *InfoPass***

*InfoPass* is the on-line appointment system that the Bureau of Citizenship and Immigration Services (USCIS) is implementing at its busiest district offices. Through *InfoPass*, applicants may check the status of their cases on-line and may schedule appointments with immigration information officers, reducing the need to wait in line. Through *InfoPass*, USCIS also offers applicants e-mailed updates when the status of their case changes.

According to USCIS, *InfoPass* is now offered in 12 languages including: Arabic, Chinese, Creole, English, French, Korean, Polish, Portuguese, Spanish, Tagalog, Russian, and Vietnamese. USCIS plans to add additional languages in the future. Employers and international personnel can access *InfoPass* at [www.uscis.gov](http://www.uscis.gov).

Currently, USCIS has launched *InfoPass* in the following district

offices: Anchorage, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cleveland, Dallas, Denver, Detroit, Honolulu, Houston, Los Angeles, Miami, New Orleans, New York City, Newark, Philadelphia, Phoenix, Portland, ME, Portland, OR, San Diego, San Francisco, San Juan, Seattle, Washington, DC. By the end of September, USCIS is expected to launch *InfoPass* in the following additional locations: El Paso, Harlingen, Helena, Kansas City, Omaha, San Antonio, and St. Paul.

The *InfoPass* program opened last year in Miami, and reports indicate that it was successful in reducing wait times and lines. However, it is unclear how effective this program will remain without funding in addition to the application user fees. It is also unclear how each district is handling emergency and expedited issues within *InfoPass*. Be sure to talk to your AILA attorney about *InfoPass* and what benefits it can bring for your employees. ■

## **SPOTLIGHT**

### **9/11 Commission Report to Impact Immigration**

The National Commission on Terrorist Attacks upon the United States (9/11 Commission) released its final report on July 22, 2004. The report contains various observations and recommendations related to immigration controls and inter-agency information sharing which will likely change the face of immigration procedures regarding the issuance of visas, as well as the entry and exit procedures, and treatment of all foreign nationals.

While the 9/11 Commission calls for a welcoming immigration system that facilitates low-risk travelers, implementing the recommended changes would have a noticeable impact on every U.S. employer who has international personnel or international clients. In the coming months, Congress is expected to introduce legislation that would attempt to implement many of the 9/11 Commission's recommendations, notwithstanding that many of these recommendations are very general and, if improperly drafted and implemented, could negatively impact our security needs and the flow of people into

this country. Many expect that Congress will pass, and the President will sign into law, legislation that will implement these recommendations before the November elections. Employers therefore should familiarize themselves with the 9/11 Commission's recommendations.

The report contends that because border security was not considered to be a national security matter prior to 9/11, neither the State Department's consular officers nor the Immigration and Naturalization Service's inspectors or agents were viewed as full partners" in national

counterterrorism efforts. As a result, there were various “missed opportunities” where shared intelligence might have hampered the 9/11 hijackers’ ability to enter or remain in the United States. To correct this weakness and integrate immigration authorities into a wider information-sharing network, as well as make it more difficult for terrorists to enter the United States, the Commission recommends the following:

- **Address problems of screening people with biometric identifiers across agencies and governments, including our border and transportation systems, by designing a comprehensive screening system that addresses common problems and sets common standards.** “As standards spread,” the Commission states, “this necessary and ambitious effort could dramatically strengthen the world’s ability to intercept individuals who could pose catastrophic threats....For terrorists, travel documents are as important as weapons.” (Full Report at pp. 384, 387). “The current patchwork of border screening systems, including several frequent traveler programs, should be consolidated with the US-VISIT system to enable the development of an integrated system, which in turn can become part of the wider screening plan we suggest.” (Full Report at p. 388).
- **Quickly complete a biometric entry-exit screening system, one that also speeds qualified**

**travelers.** The Commission finds that Americans, Canadians and Mexicans should not be exempt from carrying biometric passports or otherwise enabling their identities to be securely verified when they enter the United States. “The current system enables non-U.S. citizens to gain entry by showing minimal identification,” the report states. “The 9/11 experience shows that terrorists study and exploit America’s vulnerabilities.” To balance this requirement, the Commission urges that programs to speed known travelers be given a higher priority, thus permitting inspectors to focus on those who pose greater risks. “The daily commuter should not be subject to the same measures as first-time travelers,” the report notes. An individual should be able to pre-enroll, with his or her identity verified in passage. Updates of database information and other checks can ensure ongoing reliability. The Commission believes that the solution to balance the need for security with the flow of traffic, which still will require more research and development, is likely to combine radio frequency technology with biometric identifiers. (Full Report at p. 388).

- **Integrate the U.S. border security system into a larger network of screening points that includes the transportation system.** Such a screening system should “look for identifiable suspects or indicators of risk” and would require “frontline border officials who have the tools and

resources to establish that people are who they say they are.” (Full Report at p. 387).

- **Set standards for the issuance of birth certificates and sources of identification, such as driver’s licenses.** (Full Report at p. 390).
- **Target terrorist travel.** The Commission recommends that travel intelligence, operations and law enforcement be combined in a strategy to intercept terrorists, find their travel facilitators, and constrain their mobility.
- **Immigration Law and Enforcement.** Within the section of the report laying out the Commission’s immigration-related recommendations, the Commission noted the following:

*Our borders and immigration system, including law enforcement, ought to send a message of welcome, tolerance, and justice to members of immigrant communities in the United States and in their countries of origin. We should reach out to immigrant communities. Good immigration services are one way of doing so that is valuable in every way—including intelligence.*

*It is elemental to border security to know who is coming into the country. Today more than 9 million people are in the United States outside the legal immigration system. We must also be able to monitor and respond to entrances between our ports of entry, working with Canada and Mexico as much as possible. (Full Report, at p. 390) ■*