

# CONNECT!

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

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## WELCOME BACK TO *CONNECT!*

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

## REGULATORY UPDATE

### SSA to Verify Documentation of Foreign Nationals with INS

On September 1, 2002, the Social Security Administration (SSA) implemented a nationwide policy change in the processing of social security number (SSN) applications submitted by all foreign nationals. The change requires the SSA to verify a foreign national's immigration documents and status with the INS's Systematic Alien Verification for Entitlements (SAVE) information service and database before processing an application for a SSN or a replacement card. A more rigorous check is required for foreign nationals who were either born in, or most recently resided in, Iran, Iraq, Sudan or Libya.

At this time it is unclear if this additional step in processing will result in significant delays in the issuance of SSNs. However, Human Resources representatives should be aware that foreign nationals who have been in the country for less than 30 days may still have their SSN applications processed even if the SAVE system does not verify their INS documentation. If the foreign national submits his or her application after the 30 day mark, he or she will have to wait for a positive verification from SAVE before obtaining the SSN. By encouraging foreign national workers to apply for their SSNs in a timely fashion, employers can help their workers avoid any delays that may result from this new practice. ♦

### New Filing Procedures Should Reduce Delay for Foreign Nationals Applying for Green Cards

The INS has issued an interim rule that is expected to ameliorate processing delays associated with Green Card applications. The new rule, which went into effect July 31, 2002, allows for concurrent filing of the Form I-140, Immigrant Petition for Alien Worker, and Form I-485, Application for Ad-

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justment of Status, if a visa number is immediately available.

Concurrent filing will allow foreign nationals to apply immediately for employment authorization, thereby allowing them to continue working in the event that their current visa expires before they receive their Green Card. Before this rule went into effect, applicants had to wait for the Form I-140 to be approved before filing for a work permit. With processing times lasting as long as four months or more, the new rule will enable many foreign workers who otherwise would have had to return to their home country to remain in the U.S. and continue working.

Employers who have filed or are considering filing Form I-140, Immigrant Petition for Alien Worker, should check with their AILA attorney in order to determine if they are able to take advantage of this new procedure. ♦

## **Foreign Nationals to Register Change of Address with the INS**

The INS has revived a set of previously unenforced laws that require all foreign nationals over the age of fourteen who remain in the U.S. for more than thirty days to notify the INS of any change in their address, and provide the new address within ten days of moving. Failure to provide such notification may result in up to six months imprisonment and/or a fine of no more than \$1,000, and may result in the foreign national being taken into custody by the INS and placed in removal proceedings.

In addition to reviving the old laws, the INS has proposed a new regulation that requires all foreign nationals who are applying for immigration benefits to acknowledge that the INS will use the most recent address provided by the foreign national for all purposes,

including the service of a Notice to Appear if removal proceedings are initiated. The new regulation states that if the foreign national fails to provide notification of a change in address to the INS, he or she will be held responsible for any communications sent to the most recent address the alien has provided.

Once the new regulation goes into effect, the foreign national has the burden of keeping the INS updated of any change in address. If the foreign national for any reason was placed in removal proceedings and ordered deported for failing to appear at a hearing, he or she would no longer be able to reopen the hearing by demonstrating a failure to receive notice of the hearing.

Employers should consult their AILA attorney about having their foreign national employees register their addresses with the INS. ♦

## **LEGISLATIVE UPDATE**

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It is important that members of Congress hear from the business community about immigration issues that are vital to business interests. Businesses and business groups can help influence the development and passage of federal laws when they share with their elected officials their experiences with the immigration system and show their support for legislation that promotes a responsible immigration policy responsive to the needs of American businesses. The following articles highlight upcoming or pending legislation that will significantly impact business immigration. Please contact your AILA attorney for contact information for your Senators and Representatives. ♦

### **Numerical Limitations for H-1B Visas Revisited**

The American Competitiveness in the 21<sup>st</sup> Century Act of 2000 responded to our nation's period of fast economic growth and businesses' need for qualified professional workers by increasing the numerical cap for H-1B visas to 195,000 a year for fiscal years 2000-2003. That fewer visas were issued this year suggests that the program is working because it is responding to market needs – although the H-1B program was designed to deal with both labor shortages and unique specializations. The cap will revert back to its original limit of 65,000 H-1B visas in fiscal year 2004 unless Congress revisits the issue and passes a new

law. It is now time to start reviewing initiatives aimed at tailoring the H-1B program to reflect both the needs of employers in the current economy and projected employment needs in the future.

The INS has also released its annual "Report on Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2000." The report catalogs the characteristics of approved H-1B petitions by birth country, occupation, education level and salary of the foreign national beneficiary. Not surprisingly, the report confirms that almost half of the H-1B petitions approved were granted to individuals born in India. China had the next highest representation, accounting for 8% of all

approved H-1B petitions. Computer related occupations accounted for 58% of all approved H-1B petitions, and 98% of all H-1B workers have at least a Bachelor's degree.

The report also points out some interesting new information about how petitions are filed as well as characteristics of petitions that do not fit into the most common categories. The report indicates that:

- The number of approved petitions exceeds the number of individual H-1B workers, meaning that multiple employers are filing petitions for the same worker.
- Out of all H-1B visa holders, 41% have earned a master's degree or a higher academic achievement.
- After employment in computer related fields, occupations in architecture, engineering and surveying, administrative specializations and education comprised the next highest concentrations of approved H-1B petitions.

The information in the report as well as the experience and needs of American business should be the guiding forces for any reforms to the H-1B program. However, restrictionist groups, who seek to limit or eliminate the H-1B program entirely, have taken advantage of an uncertain economy to try and discredit the program. Some of the negative allegations they have been directing to both Capital Hill and the media include:

- E-mails claiming that H-1B visa holders are taking away jobs from qualified Americans and calling for an elimination of the H-1B program;
- Articles claiming that companies are giving preferential treatment to foreign nationals during lay-offs; and

- Allegations that H-1B visa holders who seek Green Cards are "slaves" to American companies because they allegedly work more hours for less wages than do American employees.

Since members of Congress are currently reviewing the recently released INS report on the H-1B program, now is the time for H-1B employers to start contacting their Congressional representatives and let them know how foreign professionals are important to businesses, and that foreign nationals are paid a fair wage and are not given preferential treatment during lay-offs. This information will help our Congressional leaders understand what is really going on in the business world, will help counteract restrictionist groups' negative messages, and will help to pave the way for H-1B visa reform that is responsive to business needs.

Employers should contact their AILA attorney to find out how to reach out to Congress in support of these pro-business initiatives. ♦

### **Department of Homeland Security and American Business**

The proposed Department of Homeland Security will constitute the largest reorganization of our government in decades. The agencies included in the new department will all change their primary mission to enhancing security and preventing terrorist attacks within the United States. Since this new primary mission will take resources away from agencies' other non-security related functions, it is important that the department, among other issues, recognize the need to protect our economic security by maintaining an efficient flow of goods and people across our borders, and by preserving this nation's access to nec-

essary workers.

Given the current sentiment, it is likely that Congress and the Administration will agree to relocate the INS and visa processing to the Department of Homeland Security, with the INS's two primary functions (services and enforcement) being among the most effected by the transfer to the new department. Many fear that the new focus on security will result in an immigration system that treats all foreign nationals entering our country as potential terrorists. This mindset could affect our country's commerce and trade by severely impeding the movement of people and goods through our borders and creating longer and more erratic visa application processing times.

The positive aspect of the change is that the INS could finally receive the restructuring it has desperately needed for years. However, the manner in which the INS is restructured is still a critical issue that is under debate, and the House and Senate have each offered different proposals. The House already passed its version of the bill, and the Senate is expected to vote within the first few weeks of its return in September. Only by choosing a restructuring plan that divides the INS's service and enforcement functions and coordinates them within one division under a strong leader will our immigration function have the ability to address its current problems as well as confront new issues that will arise under the Department of Homeland Security.

The Senate's Department of Homeland Security bill, S. 2452, would transfer the INS to its own separate fifth division within the new department and restructure the agency significantly by splitting up the enforcement and service functions into two equal branches under a leader who has the authority to coordinate them.

This proposed coordination within the fifth division is key for a successful immigration function since almost every immigration-related action involves both enforcement and service components. This restructuring will be key to the agency's ability to achieve consistent interpretation and implementations of policy that in turn will lead to more efficient adjudications and effective enforcement. Although the Senate's plan for moving and restructuring the INS should result in real positive reform of the INS, observers expect a competing bill offered by Senator Phil Gramm (R-TX) (S. 2794), to be introduced as a substitute to the Senate's current legislation. The Gramm bill would move all immigration functions back within the larger Border and Transportation Security division, which also includes Customs, the Coast Guard, Federal Protective Services, the Transportation Security Administration, and the Animal, Plant, and Health Inspection Service. Such reorganization would lead to problems in both adjudications and enforcement.

The House version of the Homeland Security bill, H.R. 5005, would split up the INS, with services remaining in the Department of Justice and enforcement and inspections going into the Homeland Security Department. At first blush, this proposal for restructuring appears to make sense. In actuality, both services and enforcement would be ill-served by this arrangement. Policy guidance and legal opinions would come from the Department

of Homeland Security, and the lack of coordination between services and enforcement would harm both functions.

If immigration is to be included in the new department, all of immigration should be included, so as to ensure coordination and have a single leader in charge. Without adequate coordination between the INS enforcement and services functions, INS policy would be subject to multiple interpretations and thus would become more fragmented and disparate. The effects of uncoordinated interpretation can already be seen in the adjudication of Trade NAFTA (TN) visa applicants who apply at the border. In recent years, adjudications of these petitions have become more inconsistent and restrictive due to a lack of coordination and communication between the INS inspectors at different ports of entry and a perceived need by some immigration inspectors to make entries into the U.S. under this visa category more restrictive. The result has not deterred those meaning to harm our country, but has prevented the entry of legitimate workers.

In both the House and the Senate, responsibility for setting policy and regulations regarding visa issuance would also go into the Department of Homeland Security, with the Department of State issuing the visas. As is the case with the current INS functions, such a division of policy and process for visa issuance could result in increased delay and dysfunction in a system that is already overburdened with

applications. Therefore, policy control for visa issuance is best left at the State Department.

It is worth noting that the House bill also includes a pro-business provision, proposed by Representative J.C. Watts (R-OK), that would create a special assistant to the Secretary of Homeland Security who would be responsible for working with the private sector in order to enhance the department's relationship and responsiveness to the business community. In order to foster this relationship, the assistant would create private sector advisory councils composed of business representatives and associations who would advise the Secretary on contributions available by the private sector as well as review the department's policies. The assistant would also work to coordinate federal and private laboratories, promote existing public-private partnerships and assist in the development of private sector best practices to ensure the safety of critical infrastructure.

If the new Department of Homeland Security is to support the flow of goods and people that are necessary to encourage our economic security, it will need to include an immigration function that is restructured according to the current plan in the Senate and will need to include a mechanism, like the one included in the House bill, by which the interests and needs of the private sector can be addressed. ♦

## Proposed New Restrictionist Bill Would Place Additional Burdens on Employers

Representative George Gekas (R-PA), Chair of the House Immigration, Border Security and Claims Subcommittee, has introduced H.R. 5013, a restrictionist bill that would make a number of onerous changes to our immigration laws and would make it harder to find temporary workers. Examples of these changes include: a drastic reduction in immigration numbers; the creation of a visa term compliance bond; elimination of all non-diplomatic visas for residents and citizens of particular countries; elimination of employment-based immigrant visas for unskilled workers; and

the creation of a mandatory employer-driven employment verification system. Although it is unlikely that this bill will move through Congress, it reflects restrictionist views that would limit the progress of responsible immigration reform.

The employment verification system proposed in the bill builds on the current I-9 process. Businesses wishing to hire a foreign national would be required by law to use this system within three days of a hire to verify a foreign national's identity, social security number and work authorization.

If an employee's records could not be verified by the INS system, the employer would then have to begin the secondary verification process. Employers who received a final

nonverification would have to either terminate the employee or notify the Attorney General (AG) that they didn't make the termination. Failure to so notify the AG would constitute an I-9 verification violation, and the employer would be subject to fines of up to \$10,000 per person. If the employer continued to employ the individual, the proposal would establish a rebuttable presumption of a knowing employment violation.

Employers would still have to perform the I-9 document verification, and would not be able to accept expired documents of any kind. All identity documents would have to contain a photograph. ♦

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## HIGHLIGHT

### Social Security No-Match Letters and the Effect on Business

As more and more businesses are receiving letters from the Social Security Administration (SSA) informing them that they have employees whose personal information does not match the SSA's records, it is important for employers to understand the impetus behind these letters and how to respond to the SSA's request for corrected information. Most importantly, employers who receive these letters should contact their AILA attorney for advice tailored to their particular circumstances and should let their members of Congress know the effect these letters are having on American businesses.

This year, the SSA has stepped up its efforts in asking employers to correct cases in which their employees'

information does not match the agency's records. Currently, information for roughly seven million workers does not match SSA records, and the agency has sent out 800,000 of these no-match letters to one out of every eight businesses in America in an effort to fix the problem.

The reasons employers receive a no-match letter stem from typographical errors, changed names, the use of compound last names and the employment of workers without proper work authorization. Employers should consult their attorney and work with their employees to try and correct this information without infringing upon immigrant worker protection laws. Employers should also be sure to check their records for typographical errors and should provide a copy of the SSA letter to the affected employees. These

simple, often overlooked steps will go a long way towards finding the simple mistakes and avoiding hasty responses by both the employer and employee.

The no-match letter employers receive explains that the employer submitted at least one W-2 form in which a name or Social Security Number (SSN) did not match SSA records. The letter provides a list of the names and SSNs of all employees whose records do not match and requests that the employer provide the correct information within 60 days. It also instructs employers that the letter, in and of itself, does not provide a basis for taking adverse action against an employee and is not a statement about the employee's immigration status.

Despite that language, employers and employees have responded to the letters with panic and uncertainty.

The letters have been confused with notification of immigration violations, with some employers immediately firing individuals appearing on the list, or conversely, some employees quitting before they have a full understanding of the situation.

The SSA does not have any power to enforce its request for corrected information, but it does share information with the IRS which is authorized by regulation to fine employers \$50 for each incorrectly reported SSN. The IRS is working on a plan to begin en-

forcing the regulation, and representatives from the agency have indicated that it is currently considering fining employers for infractions that take place in 2002 and issuing the fines as early as 2004. However, it is unclear if it will meet this timeframe.

Until the new program is implemented, employers are still subject to the current regulations that impose penalties if incorrect information is submitted to the IRS. These regulations provide waivers from penalties if the employer acts in a responsible man-

ner, has only minor infractions, or if the events of noncompliance are beyond the employer's control.

According to SSA and IRS representatives, neither agency is currently sharing detailed information with the INS. The only information that the SSA passes on to the INS is information relevant to investigations between the two agencies and an annual report that is required by law. ♦