

Immigration Law Update

Current Developments in Employment-Based Immigration

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This periodic newsletter features current developments in employment-based immigration. It is designed to inform you of changes in immigration law that may affect your business.

August 2003

Significant Changes to L and H-1B Visa Classifications Contemplated by Congress

On July 24, two parallel bills, H.R. 2849 and S. 1452, were introduced which would substantially alter the L and H-1B visa programs. The proposed changes would include the following:

L visa program:

- * Require employers to file an attestation with the Department of Labor (DOL) stating that the L-1 employee will not perform duties at the worksite of another employer where there are indicia of an employment relationship, the L-1 employer will provide wages that are the greater of the actual wage or the prevailing wage (similar to current H-1B prevailing wage requirements), and the employer did not displace US workers for 180 days before or after the filing of the L-1 petition.
- Increase the work experience requirement with the foreign employer from one year to two years
- Limit the duration of the L-1A to 5 years and the L-1B to 3 years
- For L-1B petitions, require the employer to attest that the employer has taken good faith steps to recruit US workers for the position
- Direct the DOL to impose a fee on employers for L-1 petitions

H-1B visa program:

- Make H-1B dependent provisions applicable to all H-1B employers
- Require H-1B employer to attest that it has not displaced an American worker 90 days before or after the filing of the petition
- Require H-1B employer to attest that it will not place the H-1B worker at a third party worksite where there are indicia of an employment relationship unless there is no displacement of a US worker at the worksite for 180 days before and after the H-1B worker is placed at the worksite
- Make the \$1000 fee permanent

If passed, these bills could create a significant hardship to US employers who rely heavily on the L-1 and H-1B visa programs to

employ foreign workers. If you employ L-1 and/or H-1B workers, we urge you to contact your Congressional representatives to voice your opposition to these changes. For more information, please contact us or download the L-1 Visa Issue Packet from the American Immigration Lawyers Association at www.aila.org.



Machine Readable Passports Required for Visa Waiver Entrants

The Department of State recently announced that, beginning October 1, all nonimmigrants seeking to enter the United States pursuant to the Visa Waiver Program (business visitors and tourists from the 27 participating countries listed below) must possess a Machine Readable passport. Nonimmigrants who do not have a Machine Readable passport after October 1 will require visas to enter the United States. This change includes all categories of passports (tourist, diplomatic and official) and also requires that each family member, including infants, has his or her own passport. This change ONLY applies to nonimmigrants seeking to enter the United States without a visa; it does not apply to persons applying for visas at U.S. consular posts.

The 27 countries currently participating in the Visa Waiver Program are: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.



Significant Delays in Visa Processing at U.S. Consulates

New security procedures implemented at U.S. Embassies and Consulates around the globe are causing lengthy delays in visa issuance. Until recently, embassies and consulates exercised broad discretion in waiving the personal appearance requirement for visa issuance; nonimmigrants could apply for visas at most consular posts either by mail

or through a drop box. At many consular posts, a personal interview is now required. This has created long backlogs in securing an interview appointment, with resulting delays of weeks in obtaining a visa.

Please keep this circumstance in mind when traveling abroad, or when sending your nonimmigrant employees overseas. It is still possible to obtain visas in Canada or Mexico and through the Visa Office, but processing times are increasing there as well. (The Visa Office is currently taking 10 to 12 weeks to issue a visa.) Planning ahead is more essential than ever when contemplating foreign travel. Please contact us for up-to-date information on processing issues, or consult <http://travel.state.gov/links.html> for information on specific consular posts.



Significant Delays in Processing at BCIS

Due in part to increased security procedures, processing times at BCIS (Bureau of Citizenship and Immigration Services, the successor agency to INS) have also increased. Perhaps most important is the delay in processing of employment authorization and advance parole applications. If you or one of your employees have pending applications to adjust status, it is now essential that you apply for employment authorization no later than 90 days before your current authorization will expire, and five or six months in advance may be advisable. Adjustment of status applications at the Service Centers are now taking over two years to adjudicate, and even some BCIS employees have admitted that matters are likely to get worse before they get better.



LCA Audits Reportedly on the Increase

We have recently heard that the Department of Labor (DOL) is reportedly devoting greater resources to conducting audits of Labor Condition Applications (LCAs) filed by employers of H-1B nonimmigrants. Since we believe that audits are still primarily triggered by complaints, employers who have

recently laid off employees may find themselves vulnerable to LCA audits. Employers found to have violated the LCA requirements may be liable for payment of back wages, may be subject to fines ranging anywhere from \$1000 to \$35,000 per violation, and may be disqualified from approval of future H-1B petitions for one to three years.

We strive to provide our clients with all the information they need to comply with the LCA requirements. We do realize, however, that the LCA requirements are onerous and not always easy to understand. If you have any questions, or wish assistance in conducting an audit of your LCA files, please do not hesitate to contact us.



"Transit Without Visa" Option No Longer Available

On August 2, the Department of State and the Department of Homeland Security (DHS) suspended two programs that allow certain international air passengers to travel through the United States for transit purposes without first obtaining a U.S. visa. The programs, known as the Transit without Visa program (TWOV) and the International to International transit program (ITI), have been suspended. Under both programs, passengers who normally would have been required to obtain a visa to enter the United States were permitted to change planes in the United States en route from one foreign destination to another. The TWOV program, unlike the ITI program, allowed passengers to travel through more than one U.S. airport.

This change does not affect U.S. citizens or nationals of countries who are eligible to enter the U.S. under the Visa Waiver Program. For additional information, please contact us or consult the Department of State website at <http://travel.state.gov>.



Credentials Certification Required for Nonimmigrant Health Care Professionals

On July 25, DHS published a final rule implementing the requirement for health care

professionals, other than physicians, to obtain certification from an approved professional credentialing organization before entering the US as nonimmigrants seeking employment. The rules also apply to individuals extending their stay or changing to a work-authorized status for employment as a health care professional.

The rule requires individuals seeking a work-authorized nonimmigrant visa status to work in the following occupations:

- Licensed Practical Nurses, Licensed Vocational Nurses, and Registered Nurses
- Physical Therapists
- Occupational Therapists
- Speech-language Pathologists and Audiologists
- Medical Technologists (also known as clinical laboratory scientists)
- Medical Technicians (also known as clinical laboratory technicians)
- Physician Assistants

The rule does not apply to physicians, individuals seeking admission to the US to perform services in a non-clinical health care occupation (such as medical teachers, medical researchers, or managers of health care facilities), individuals coming to the US to receive training in H-3, F-1 or J-1 status, or the spouse and dependent children of any immigrant or nonimmigrant.

The certification will verify the individual's credentials and provide evidence that he/she has the required English language proficiency. There are currently three organizations which have been approved by the Attorney General to issue these certifications:

the CGFNS (www.cgfns.org), for all occupations; the National Board for Certification in Occupational Therapy (www.nbcot.org), for occupational therapists, pending final adjudication of its credentialing status; and the Foreign Credentialing Commission on Physical Therapy (www.fccpt.org), for physical therapists, pending final adjudication of its credentialing status.

The rule goes into effect on September 23, 2003; however, DHS has indicated that it will

allow health care workers affected by the rule additional time to comply. Prior to July 26, 2004, the certification requirement will be waived for nonimmigrants subject to this requirement who enter the US or change or extend nonimmigrant status in the US. The nonimmigrant will be granted status valid for one year. To be readmitted or extend/change status after that time, the nonimmigrant must have obtained certification.

If you are or if you know a nonimmigrant working in one of these professions, we strongly suggest that you contact the appropriate credentialing organization to obtain the necessary certification as soon as possible. As obtaining the certification may take several months, obtaining it now could prevent problems with future entries to the United States, or delays in adjudication of future nonimmigrant petitions. Please feel free to contact us if you have any questions.



Visa Lottery Scheduled for November and December 2003

The Department of State has announced instructions for this year's Diversity Visa Lottery (DV-2005). This year, lottery applications must be made online at www.dvlottery.state.gov from November 1, 2003 to December 30, 2003. Paper entries will not be accepted. For more information, please contact our office or consult <http://travel.state.gov/dv2005.html>.

Rosner and Associates helps corporations to bring foreign nationals to the U.S., and to obtain employment visas for U.S. citizens transferred abroad. We can also assist in obtaining permanent residence (green cards), student and exchange visitor visas, naturalization, and in preventing deportation.



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