

# Immigration Law Update

## Current Developments in Employment-Based Immigration

By Rosner & Associates. L.L.C.

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.

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*This is the latest installment in our efforts to keep you apprised of the rapidly changing U.S. immigration environment. Some of the most recent changes could have a serious impact on you or your employees, and we urge you to communicate these changes to interested parties. If you have any questions, please do not hesitate to contact us.*



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### ***Planning Ahead:***

#### ***Filing H-1B Petitions for FY 2007***

The 2004 and 2005 fiscal years have been a lesson in the value of strategy and long-term planning for employers seeking to hire foreign workers. We have seen the number of available H-1Bs plummet from 195,000 to 65,000 and then rise to 85,000, with 20,000 reserved for beneficiaries holding a U.S. master's degree or higher. The H-1B "caps" in FY 2004 and 2005 were met before the commencement of the fiscal year, although the cap reserved for advanced degree holders provided some relief even into the beginning of 2006. Nevertheless, the days are over in which employers could petition for H-1B status on behalf of new employees without considering how long to wait or when to file.

Fiscal year 2007 will begin on October 1, 2006. As was the case for FY2006, USCIS will make available 85,000 H-1B visas for FY2007. Of that number, 20,000 will be allocated to professionals holding a U.S. master's degree or higher, and 6,800 will

be allocated to citizens of Chile and Singapore, under trade agreements between the U.S. and those countries. As H-1B petitions may not be filed more than six months in advance of the requested start date, April 1, 2006 marks the first date that H-1B petitions counted towards the FY2007 cap can be filed. Employers seeking to hire new foreign workers should make an effort to plan ahead, especially in the case of applicants who do not hold a U.S. master's degree or higher. Employers should be aware of the trend that has exhausted H-1B visas before the commencement of the fiscal year for which they were made available. Although employers have more flexibility in the case of prospective employees with advanced U.S. degrees, it is still wise to plan ahead for these individuals.

### ***Scenario:***

#### ***Changing Status from F-1 to H-1B***

A common category of worker affected by the H-1B visa cap is the worker who has recently graduated from a U.S. college or university and is currently working for an employer pursuant to F-1 Optional Practical Training. These types of workers are generally the beneficiaries of an Employment Authorization Document ("EAD") valid for 365 days. Employers interested in retaining these workers for more than a year must petition for H-1B status on their behalf. Because the H-1B quota is met so quickly, particularly in the case of workers who do not hold a U.S. master's degree or higher, it is vital that employers plan ahead to preserve an employee's status beyond the expiration of his or her EAD.

Please note that, in some cases, employees may face a gap between the expiration of their EAD and the start of FY2007 (October 1.) Although individuals in this situation have a 60 day grace period in which they may remain in the United States past the expiration of the EAD, they are not permitted to work during this period.

In some years past, USCIS has allowed F-

1 students waiting for the start of H-1B status to remain in the United States during the period between the conclusion of their 60 day grace period and the beginning of H-1B status valid with the start of the next fiscal year. CIS did not allow this in FY2006, and there is a strong likelihood that they will not do so in FY2007 either. If any of your employees are facing a "cap gap," please contact us for additional information.

### ***Scenario:***

#### ***Changing from a Cap-Exempt Employer to a Cap-Subject Employer***

Not all H-1B beneficiaries are subject to the H-1B cap. Beneficiaries who have held H-1B status within the last six years and have not departed the United States for more than a year since attaining H-1B status are not subject to the numerical H-1B limit. There are additional exemptions for beneficiaries employed by institutions of higher education, medical facilities in underserved areas, nonprofit organizations affiliated with institutions of higher education, and nonprofit or governmental research organizations.

Beneficiaries holding H-1B status who have not been counted against the H-1B cap due to the exempt status of their employer will subsequently be counted against the cap if they accept employment with a non-exempt employer. Thus, for example, a scientist currently working in H-1B status for a university will be subject to the H-1B cap if he or she wishes to begin working for a private employer who is not cap-exempt.

### ***Think Ahead***

On April 1, 2006 USCIS will begin to accept H-1B petitions requesting an October 1 start date. Employers anticipating new hires who will need H-1B status should plan to file petitions on behalf of these individuals as soon as possible. Employers should pay special attention to employees who hold EADs, as these individuals will need H-1B status to

continue their employment beyond the expiration of their EAD. In some cases, employers need to be prepared for the possibility that there will be a gap between the validity of the EAD and the H-1B start date.



**Update:**

**Immigrant VISA Backlogs**

As we have reported before, foreign nationals seeking to immigrate to the U.S. face lengthy backlogs in many immigrant classifications. The third employment-based classification (professionals, known as EB-3) has backlogs for nationals of every country, the longest of which, for nationals of India, is over five years. Nationals of India and China also face backlogs in the first (EB-1) and second (EB-2) employment-based classifications of from 2 to 4 years. EB-1 includes multinational managers and executives, outstanding researchers and extraordinary ability individuals; EB-2 includes persons with advanced degrees. While the EB-1 and EB-2 classifications have seen unexpected movement, movement in the EB-3 classification has been very slow.

There are a number of bills pending in Congress which would provide relief to the backlogs, but in an election year, it remains to be seen whether any of them go anywhere. We will keep you apprised of any developments in this area. In the meantime, if you have any questions about the backlogs, please contact us.



**Legislation Watch:  
The Growing Movement for  
Immigration Reform**

A U.S. Senate Panel has neared agreement on a proposal that would allow undocumented foreign nationals to obtain six-year nonimmigrant visa status in the country. Qualifying applicants would be required to pay a \$2,000 fine, but would be entitled to apply for permanent resident status at the expiration of their visa status. Senate Majority Leader Bill Frist has announced that the Senate will hold a vote on immigration reform on March 27<sup>th</sup>, putting pressure on the Senate Judiciary Committee to reach consensus regarding the details of the proposed legislation.

Congress' ongoing debate on immigration reform is gathering momentum and

response from citizens and businesses in the United States. The American business sector seems increasingly cognizant of the need to provide a legal framework from which to fill jobs that Americans either cannot or will not do.

Immigrants also are rallying to their own cause. Last week, 100,000 people gathered in Chicago; 5,000 clamored in Oregon; and 30,000 marched in Washington to champion immigrant rights and protest House of Representatives legislation that is pushing tough border security and enforcement legislation with no provision for guest workers or mechanism for legalizing the 12 million illegal immigrants living in this country.

The next several months may produce some interesting advances in the congressional discussion on border protection and the proposed guest worker program. In particular, it will be interesting to observe whether the Senate and House are able to reconcile what thus far have proven to be very disparate perspectives on immigration reform.



**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 also assist in obtaining permanent residence (green cards), student and exchange visitor visas, naturalization, and in preventing deportation. Please consider us for your immigration law needs.



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