

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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H-1B Update – Cap Reached

The annual H-1B cap has been reached for FY2006. CIS announced in a Press Release this morning that the cut-off date was August 10. Cap-subject H-1B petitions received by CIS prior to August 10 will be adjudicated. Petitions received on August 10 are subject to a random selection process for rejection if CIS determines that there were more petitions filed on August 10 than there are visas available.

There are still visas available for FY2005 and FY2006 under the U.S. Master's degree exemption.

We will keep you apprised of any further developments. In the meantime, if you have an employee who is affected by the cap, please contact us to discuss whether other options may be available.



Cap-Gap Regulation Unlikely

In years past, U.S. Citizenship & Immigration Services (CIS) 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 has not issued a regulation for FY 2005 permitting F-1 students to remain in the U.S. during this "cap gap," and has indicated informally that such a regulation is unlikely. If any of your employees are facing a cap gap, please contact us for additional information.



PERM Update

The long-awaited PERM labor certification process was finally implemented on March 28, 2005. The U.S. Department of Labor has been struggling with its new electronic filing system, and the five months following its rollout were fraught with software glitches, thousands of erroneous denials, and frustrated employers, applicants and lawyers. Although the system continues to be a work in progress, by many accounts it is now operating more smoothly. We are now seeing many applications successfully adjudicated within a matter of weeks, although others do continue to languish. Employers report that the registration process is generally easy and fast. Unfortunately, we still await either anecdotal or definitive evidence concerning audits, particularly audit processing times. To our knowledge, not a single application has made it to final adjudication after an audit.

It remains to be seen how PERM will work long term, but thus far the new system shows some promise for drastically reducing labor certification processing time. We will provide you with additional information as we become more familiar with the process, and as we hear of the experience of others.



DOL Backlog Update

All labor certification applications filed prior to March 28, 2005 have now been sent to one of the Backlog Processing Centers (BPCs) in either Dallas or Philadelphia. As you may know, DOL has

indicated that it will be sending "Selection of Continuation Option" letters (known as "45 day letters") for each application, requesting confirmation from employers that they wish to proceed with processing. We have received 45 day letters from the BPCs for somewhat less than half of the applications we have filed, some of which have been pending since 2002. Eventually, we should receive 45-day letters for all of these applications. DOL's stated goal is to have all letters sent out by the end of the FY2005.

DOL claims to be adjudicating these applications on a first-in, first-out basis in two tracks – standard labor certification, and Reduction in Recruitment. To date, very, very few of these applications have been adjudicated, ostensibly because DOL is focusing on entering data about cases and issuing 45 day letters.

DOL has refused to issue projected processing times for applications at the BPCs, other than to say it expects to have all applications adjudicated within 28 to 30 months of March 28, 2005, at which time the BPCs are expected to be closed. We will keep you apprised of developments regarding backlogged applications.



Changes Occurring in Final Issuance of Green Cards

Recently, there has been some confusion regarding the issuance of I-485 approval notices and the procedures foreign nationals must follow to receive their Permanent Resident Cards ("green cards"). In recent months, CIS modified how it completes the card manufacturing process. According to CIS, all applications should fall into one of the following three categories:

1. Data needed to manufacture the card is captured from the I-485 application, and the card is mailed at roughly the same time as approval notice.
2. Data needed to manufacture the card

must be obtained from the applicant, and such data is obtained through a visit to the local Application Support Center for biometrics processing roughly 6 weeks after approval of the I-485. The appointment notices look very much like fingerprint notices, but have a "Code 2" indicated on the notice. Children under 14 are also being scheduled for biometrics processing.

3. As with previous procedures, the applicant is instructed on the I-485 approval notice to make an InfoPass appointment at the local CIS office for final processing.

CIS has indicated that its goal is to have all adjustment applicants processed under the first process. However, as the agency phases in this procedure, uncertainty and inconsistency remain. We understand that generally, the older the application, the more likely it will encounter either process 2 or 3 above.

Of more concern to most applicants is an accompanying change in the green card approval process. Previously, upon approval of the I-485, the applicant would visit the local CIS office to complete

processing, and at the same time, would obtain a stamp in his or her passport which served as temporary evidence of permanent residence. CIS will no longer provide that stamp, due to the fact that green cards are being manufactured within a matter of weeks, rather than months. However, CIS does recognize that some applicants do sometimes have a need to travel abroad between approval of the application and receipt of the card. If one of your employees does have such a need for travel, they must make an InfoPass appointment at the local CIS office, and take to the office a valid passport, the original I-485 approval notice, and proof of international travel within the next few weeks, such as a plane ticket. CIS will issue a stamp valid for 90 days unless the CIS computer system shows that the green card has already been made. In that situation, the individual may not leave the U.S. until after he or she has received the Permanent Resident Card.

If one of your employees faces this travel dilemma, please contact us for current information on CIS procedures.



Immigrant Visa Quotas

As you may know, the third preference employment-based immigrant classification (skilled workers and professionals, known as "EB3") continues to be unavailable for all nationalities. We expect that visas will become available for most nationalities for FY2006, if not sooner. Backlogs will likely remain, however, for nationals of China (mainland-born), India and the Philippines for the foreseeable future.

The Department of State has indicated that it expects a backlog to develop in the second employment-based immigrant classification (individuals with advanced degrees), possible as early as September 1, 2005. We expect that only nationals of China (mainland-born) and India will be affected, but this remains to be seen.

We will keep you advised of developments on this issue. In the meantime, if one of your employees may be subject to the EB2 backlog, please let us know as soon as possible so that we may consider available options.



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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