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# 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.

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**November 2004**

*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.*



### **DV-2006 VISA Lottery Application Period Opens**

On November 5, 2004, the U.S. Department of State opened a two month application period for the Fiscal Year 2006 green card lottery. This is an opportunity for you or your foreign national employees to win green cards for self and dependent family. The program is known as "DV-2006." This year marks the second year that electronic registration is required. Paper entries and mail-in requests for registration are not accepted. This program makes available 50,000 diversity immigrant visas each year via a random selection process intended to benefit natives of "low admission" countries, as defined by U.S. Citizenship and Immigration Services ("USCIS") (formerly known as INS).

To be eligible, the applicant must NOT be a native of any of the following "high-admission" nations: Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Russia, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. (Nativity in most cases is determined by country of birth, not necessarily country of current citizenship.) In other words, natives of these countries are not eligible to enter the lottery. Natives of all other countries are eligible, as are natives of Hong Kong, Macau, Taiwan and Northern Ireland, provided they meet certain employment and education requirements. Specifically, the applicant must have EITHER a high school education or its

equivalent, OR two years of work experience within the past five years in an occupation that requires two years of experience or training. Persons born in an ineligible country may apply if their spouse was born in an eligible country. The enclosure describes in detail these eligibility requirements.

The application process is easy and something that anyone should be able to complete without assistance from an immigration lawyer or immigration consultant. Use of a lawyer or consultant will not improve the chances of being selected. No application fee is required. The applicant must complete the Electronic Diversity Visa Entry Form, which is accessible only at <http://www.dvlottery.state.gov>. The form must be completed in its entirety and submitted electronically during the registration period, which began at noon EST (GMT-5) on Friday, November 5, 2004 and will end at noon EST (GMT-5) on Friday, January 7, 2005. PAPER ENTRIES WILL NOT BE ACCEPTED. The Department of State will send entrants an electronic confirmation notice upon receipt of completed entry form.

The applications must include digital photographs which must satisfy specific requirements. Photographs of the applicant and the applicant's spouse, all natural children, as well as all legally-adopted children and stepchildren, who are unmarried and under the age of 21, must be included with the entry form.

In addition, although each spouse may submit an application without penalty, duplicate or multiple applications submitted by any one individual will result in disqualification. Since the selection process is random, all applications received during this period will have an equal chance of being selected. All selected applicants will be chosen and notified by mail. All notification letters will be sent within about nine months of the end of the application period to the address indicated

on the entry. Non-winners will not be notified.

In the past some winners of the lottery have been found ineligible for green cards. Other winners have failed to respond. To insure an adequate pool of winners to award 50,000 green cards, far more than 50,000 applicants will be selected. Thus, anyone selected in the lottery should comply with the instructions contained in the notification letter to pursue his or her green card application as soon as possible after October 1, 2005 and no later than September 30, 2006. Failure to do so will result in ineligibility to immigrate based on the DV-2006 lottery.

It is a relative long-shot that any particular application will be selected. However, we strongly recommend that all individuals falling within the above-mentioned criteria who are considering permanent immigration to the United States take advantage of the DV-2006 lottery due to its ease and lack of expense. Individuals may wish to enter the lottery even if they have an immigrant petition already pending.

Detailed instructions and photo specifications are available at <http://www.dvlottery.state.gov>. Please feel free to contact Rosner & Associates for assistance or additional information regarding participation in this year's diversity visa lottery program.



### **I-9 Electronic Storage Bill Signed into Law**

On October 30, 2004, President Bush signed into law H.R. 4306 (P.L. 108-390), which allows employers to electronically complete and store employment eligibility verification. The law, which amends Section 274A(b) of the Immigration and Nationality Act, includes a provision permitting the use of handwritten or electronic signatures in completing I-9 forms, in addition to its provision

permitting electronic storage. The law will take effect 180 days after October 30 (April 28, 2005) or upon the effective date of the final rule implementing the law, whichever is earlier.

Once effective, the new law will assist employers in reducing the rather cumbersome paper retention requirements previously mandated under Section 274A(b). As employers are aware, Forms I-9 are not filed with the U.S. government, but are retained by the employer, which must maintain them in its own files for three years after the date of hire or one year after the date of termination, whichever is later. With the implementation of P.L. 108-390, employers will be able to maintain I-9 records in electronic files, rather than in space-consuming paper files.

Auditing requirements remain the same under the new law. Upon request, all Forms I-9 subject to the retention requirement must be made available in their original form or on microfiche to an authorized official of DHS. Additionally, documentation requirements necessary to comply with Section 274A(b) are not altered by the new law. This means that employers are still required to review original documents before electronically signing Form I-9.

We will advise you when we have additional information concerning implementation of the new law. If you have any questions concerning the new law or Form I-9 requirements in general, please contact Rosner & Associates or the Office of Business Liaison at Citizenship & Immigration Services <http://uscis.gov/graphics/services/employerinfo/oblhome.htm>.



### ***IRS Advice on Dealing with SSN Delays***

The Internal Revenue Service has posted on its website a statement on how employers can deal with the delays in obtaining Social Security Numbers for new foreign national employees. As many of you know from personal experience, since September 30, 2002, the Social Security Administration will not issue SSNs to foreign nationals until it has verified the individual's immigration status with CIS. Due in large part to a lack of staff to handle this task at CIS local offices, the

verification can take a month or more. IRS states that it will not issue an Individual Taxpayer Identification Number to foreign nationals who are waiting for SSNs, but that it will be "quite favorable" in not assessing penalties associated with an employer's failure to provide a payee TIN when required. IRS states that employers who are faced with this situation should retain documentation to show that failure to provide a TIN for a particular employee is caused solely by SSA delays in issuing a Social Security Number to the employee.

The IRS statement may be found online at <http://www.irs.gov/businesses/small/international/article/0,,id=129227,00.html>.



### ***US-Visit Expands to 50 Busiest Land Ports of Entry***

The Department of Homeland Security (DHS) has recently announced its plan to begin implementation of US-VISIT, the United States Visitor and Immigrant Status Indicator Technology Program, at the 50 busiest land Ports of Entry (POEs) by December 31, 2004 or earlier. As we have reported previously in this newsletter, US-VISIT is an integrated, automated entry-exit system that records the arrival and departure of foreign nationals, verifies the identity of foreign nationals, and authenticates travel documents through comparison of biometric identifiers.

The POEs and the anticipated dates of implementation are as follows:

Estimated start date of November 15, 2004

- Port Huron POE, Blue Water Bridge, Highway 69 and International Border, Port Huron, MI
- Douglas POE, Rte 191 and International Border, Douglas, AZ
- Lincoln-Juarez Bridge POE, Laredo, TX
- Gateway to the Americas International Bridge POE, Laredo, TX
- Columbia Solidarity Bridge POE, Laredo, TX
- World Trade Bridge POE, Laredo, TX

Estimated start date of December 6, 2004

- Niagara Falls POE (to include Lewiston-Queenstown, Whirlpool, and Rainbow Bridges), Niagara Falls, NY
- Peace Bridge POE, Moore Drive and International Border, Buffalo, NY

- Detroit Ambassador Bridge POE, Detroit, MI
- Detroit-Windsor Tunnel POE, Detroit, MI
- Lukeville POE, Highway 85 & International Border, Lukeville, AZ
- Nogales East (Deconcini POE), Nogales, AZ
- Nogales West (Mariposa POE), Nogales, AZ
- San Luis POE, Highway 95 & International Border, San Luis, AZ
- Andrade POE, Andrade, CA
- Calexico East-Imperial Valley POE, Rte 111 and International Border, Calexico, CA
- Calexico West POE, Rte 111 and International Border, Calexico, CA

Estimated start date of December 13, 2004

- Fabens POE 18051, Island Guadalupe, Fabens, TX
- Presidio POE, Border Station Highway 67, Presidio, TX 79845 Santa Teresa POE, Santa Teresa, NM
- Otay Mesa POE, 9777 Via De La Amistad, San Diego, CA
- San Ysidro POE, Highway 5 and International Border, San Diego, CA
- Tecate POE, Hwy 188 and International Border, Tecate, CA
- Blaine-Pacific Highway POE, Rte. 543 and International Border, Blaine, WA
- Blaine-Peace Arch POE, Interstate 5 and International Border, Blaine, WA
- Lynden POE, Rte. 539 and International Border, Lynden, WA
- Point Roberts POE, Tyee Drive and Roosevelt Way, Point Roberts, WA
- Sumas POE, Cherry Street and International Avenue, Sumas, WA

Estimated start date of December 20, 2004

- Champlain POE, Highway 87 and International Border, Champlain, NY
- Massena POE, Rte. 45 and International Border, Rooseveltown, NY
- Thousand Islands POE, Highway 81 and International Border, Alexandria Bay, NY
- Sault Ste. Marie POE, The International Bridge, Highway 75 and International Border, Sault Ste. Marie, MI
- Bridge of the Americas POE, El Paso, TX
- Paso del Norte Bridge POE, El Paso, TX
- Ysleta POE, Ysleta-Zaragoza Bridge, El Paso, TX
- Derby Line POE, Highway 91 and International Border, Derby Line, VT
- Calais--Ferry Point POE, Main Street and

International Border, Calais, ME

- International Falls POE, Rte 53 and International Border, International Falls, MN

Estimated start date of December 27, 2004

- Gateway International Bridge POE, Brownsville, TX
- Brownsville/Matamoros Bridge POE, Brownsville, TX
- Hidalgo POE, McAllen-Hidalgo-Reynosa International Bridge, McAllen, TX
- Los Indios POE, Free Trade Bridge at Los Indios, Los Indios, TX
- Los Tomates/Veterans International Bridge POE, Brownsville, TX
- Pharr POE, Pharr-Reynosa International Bridge, Pharr, TX
- Progreso POE, Progreso/Nuevo Progreso International Bridge, Progreso, TX
- Rio Grande City POE, Starr-Camargo Bridge, Rio Grande City, TX
- Roma POE, Roma-Ciudad Miguel Aleman Bridge, Highway 83 and International Border, Roma, TX
- Del Rio POE, Del Rio/Ciudad Acuna International Bridge, Garfield Ave & Intl Border, Del Rio, TX
- Eagle Pass Bridge I POE, Eagle Pass/Piedras Negras Bridge, Highway 57 & Intl Border, Eagle Pass, TX
- Eagle Pass Bridge II POE, Camino Real International Bridge, Highway 57 & Intl Border, Eagle Pass, TX

The dates listed above are estimates; however, all of the above POEs will implement US-VISIT no later than December 31, 2004. At the present time, Canadian citizens are still not subject to US-VISIT unless they are entering the U.S. pursuant to a visa stamp in their passports, but this is subject to change at any time. Children under 14 and adults over 79 are also not subject to the US-VISIT biometric requirements. For additional information, please contact us or consult the US-VISIT website at [www.dhs.gov/us-visit](http://www.dhs.gov/us-visit).



### ***Smiling Permitted, No Teeth***

Our office recently came face-to-face with a little-known aspect of CIS' new photograph requirements. As we have reported previously, CIS changed its photograph requirements several months ago from ≤-face photographs to the full-face, passport-style photographs which have been required by the U.S. Department

of State. The State Department requires a "natural expression" on its photographs, and CIS has followed suit. Buried within the State Department's photography guide is a definition of "natural expression," which reads: "The subject's expression which should be neutral (non-smiling) with both eyes open, and mouth closed. A smile with closed jaw is allowed but is not preferred." On the back of the photo instructions it distributes to the public, CIS has interpreted this definition to mean: "No expression. Smiling permitted (no teeth). No squinting or anything else that would distort features." Earlier this week, some of our clients were instructed by CIS' Cleveland District Office to retake photos which featured toothy grins. We do not know whether this is a nationwide policy, as we have not yet had any photos rejected for similar reasons by any of the Service Centers. To be on the safe side, however, we will be advising all of our clients to hide their pearly whites.



### ***Fiscal 2005 Omnibus Bill: Proposed Changes to H & L VISAs***

Congress passed an omnibus bill over the weekend which is pending the signature of President Bush to become law. H.R. 4818 includes \$388 billion in spending appropriations and two reform Acts that propose significant changes to the H and L visas, respectively. Because of an objectionable provision that allows the House and Senate Chairs of the Appropriations Committee access to individual tax returns, the bill will not be forwarded to the President for signature until the House passes a measure repealing the provision. However, the House is expected to take this action as soon as tomorrow and the President has indicated that he will sign the Bill. In the meantime it is expedient to be aware of the proposed changes to the two visa categories, as it is likely that the Bill will be enacted without changes in these subtitles.

In connection with the H visa category, the Bill includes provisions that, when enacted, will affect the number of visas available, the amount of filing fees, prevailing wage, audits, and record keeping and reports. In its only unquestionably favorable section for foreign workers, the Bill raises the H-1B visa cap by an

additional 20,000 spaces, reserved for foreign workers with Master's degrees or higher.

On a less advantageous note, and effective upon enactment of the Bill, a \$500 fraud fee will be added to the \$185 H-1B filing fee, making the total fee equal to \$685. In addition, the Bill removes the sunset provision on the additional fees levied against employers for certain H-1B petitions and raises the amount of that fee from \$1,000 to \$1,500. However, employers who employ 25 or less employees in the U.S. will only be responsible for a \$750 employer filing fee. In the case of an employer with 26 or more employees, the total H-1B filing fees will equal \$2,185, unless the employer is filing an extension for an employee that the employer has already petitioned for, in which case the total fee will be \$685. Keep in mind that this does not include the \$1,000 fee for premium processing. If an employer with over 25 workers chooses to premium process a petition for a new or portable H-1B worker, the total filing fee will be \$3,180.

The Bill also changes prevailing wage requirements, eliminating the ability of employers to offer salaries within 95% of the prevailing wage. Consequently, under the new provisions, employers will be required to pay 100% of either the prevailing wage or the actual wage of employees in the same position, whichever is higher. The Bill attempts to mitigate the harshness of this provision by mandating that government surveys provide four levels of wages commensurate with experience, education and level of supervision. The section also provides a formula for calculating intermediate wage requirements where a two level survey is used.

Lastly, the Bill includes provisions designed to compel statistical record keeping and annual reports by the Department of Homeland Security, the Department of State and the Department of Labor. For example, the Bill requires the Department of Labor to report on the investigations undertaken in response to reports of willful violation of one or more of the attestations provided on the Labor Condition Application, a requirement that suggests at least the possibility that investigations will be increased based on the reporting mandate.

Unless otherwise provided, the H-1B subtitle will take effect 90 days after the date of the Omnibus Bill's enactment. The provisions relating to the \$1,500 employer fee and the \$500 fraud filing fee will become effective upon enactment of the bill, which could occur as early as tomorrow.

The Bill also proposes changes to the L visa category, including the filing fee, the length of employment abroad for Blanket L applicants, and the creation of record keeping and reporting functions within the Department of Homeland Security and the Department of State. Like H visa petitions, petitions in the L category will require payment of a \$500 fraud fee, raising the filing fee for petitions for L status to \$685. Please note that this fee increase also applies to beneficiaries who apply under a Blanket petition.

Additionally, the Bill changes the provision permitting only six months of employment with a foreign affiliate, subsidiary or parent company abroad for L-1 Blanket petitions. Effective upon enactment of the Bill, the beneficiary will be required to have been employed by the foreign company for at least one year prior to the filing of an

application to work in the United States pursuant to L-1 status. This modification applies only to petitions for initial classification. Consequently, foreign workers currently in the United States pursuant to L-1 status who do not meet the one year requirement are not affected by the provision.

In addition, like the H visa reforms, the L visa provisions provide for heightened monitoring of L visa recipients and potential and actual abuses of the status. Specifically, the Bill calls for an Inspector General Report on the L visa program and establishes a task force to report to the House and Senate Judiciary Committees on the implementation of the Inspector General's recommendations, as set forth in the report.

As a reminder, the proposed changes to the H and L visa categories are not yet law. We will notify you as soon as we have information that President Bush has signed the bill and will advise you of what changes, if any, apply to the H and L subtitles. We will also, of course, advise you as to the soonest possible date new H-1B positions may be filed.



### ***Arlington, VA Office to Relocate***

U.S. Citizenship & Immigration Services announced yesterday that the Washington D.C. District Office, currently located in Arlington, Virginia, will move to a Fairfax, Virginia office, to open Tuesday, November 30. The new Washington D.C. District Office, which will be located at 2675 Prosperity Drive, will replace the existing Fairfax office on North Fairfax Drive. The Washington District office continues to have jurisdiction over the entire state of Virginia, in addition to the District of Columbia. As a reminder, any visits to the Fairfax office must be made pursuant to an online, InfoPass appointment.



***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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