Immigration Update

FEES

Before October 1, 2003, employers who used the H-1B program were required to pay an additional $1,000 fee imposed by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). In part, that $1,000 fee paid for U.S citizens, lawful permanent residents and other U.S. workers to attend job training and receive low-income scholarships or grants for mathematics, engineering or science enrichment courses administered by the National Science Foundation and the Department of Labor. Those ACWIA fee requirements sunset on October 1, 2003. The H-1B provisions of the Omnibus Appropriations Act reinstitute the ACWIA fee and raise it to $1,500. Petitioners who employ no more than 25 full-time equivalent employees, including any affiliate or subsidiary, may submit a reduced fee of $750. Certain types of petitions, that were previously exempt from the $1,000 fee, are still exempt from the new $1,500 and $750 fee. The new $1,500 and $750 fee applies to any non-exempt petitions filed with USCIS after December 8, 2004.

In addition, the Act created a Fraud Prevention and Detection Fee of $500 which must be paid by petitioners seeking a beneficiary's initial grant of H-1B or L nonimmigrant classification or those petitioners seeking to change a beneficiary's employer within those classifications. Other than petitions to amend or extend stay filed by an existing H-1B or L employer, there are no exemptions from the $500 fee. The new $500 fee applies to petitions filed with USCIS on or after March 8, 2005.

Each of these fees is in addition the to base processing fee of $320 to file a Petition for a Nonimmigrant Worker (Form I-129) and any premium processing fees, if applicable.

H-1B CAP

This Act provides new exemptions from the congressionally mandated annual H-1B cap. The first 20,000 H-1B beneficiaries who have earned a master's degree or higher from a U.S. institution of higher education are not subject to the annual congressionally mandated H-1B visa cap of 65,000. After those 20,000 slots are filled, USCIS

is required to count those cases against the cap for the remainder of the fiscal year.

April 2, 2007 was the first day that CIS accepted H-1B petitions for fiscal year 2008. For the first time in history, CIS received far more H-1B petitions on the very first day of filing than there were visas available. This resulted in a lottery system whereby CIS randomly selected 65,000 H-1Bs, and rejected the rest. This underscored the urgent and critical need for action by Congress to increase the number of H-1B visas available each year.

LABOR CONDITION APPLICATIONS

In 2009 the USDOL Office of Foreign Labor Certification created the iCERT system to improve access to employment-based visa application services and USDOL immigration news and information. This system currently processes Labor Condition Applications for the following visa categories: D-1, E-3, H-1B, H-1C, H-2A and H-2B. It will process PERM cases some time in the future. More information can be found at iCERT.doleta.gov.

PERM

On Monday, December 27, 2004, the U.S. Department of Labor published PERM as a final rule in the Federal Register. PERM, which is the acronym for Program Electronic Review Management, is the reengineering of the permanent labor certification process.

PERM became effective on March 28, 2005, which was the first date employers could file applications for labor certification under PERM. PERM is now the only method of filing applications for labor certification.

The significant modifications to the labor certification process are as follows:

1. The goal of PERM is to adjudicate labor certification applications within a 90 day time frame through the use of online submissions on Form ETA 9089. In reality, processing times can reach one year or longer. Further, if the DOL audits the application, requesting additional information or documentation, processing times can reach 1 year or more.

2. The wage required for beneficiaries of approved labor certifications is now 100% of the prevailing wage, as compared to old regulations that allowed employers to offer 95% of the prevailing wage.
3. The development of a four (4) level wage survey by the DOL for prevailing wage determinations.
4. As before, employer must post notice of job availability for at least ten (10) consecutive days and the notice period must be between 180 and 30 days prior to filing. Under new regulations, employer must also post though its electronic or printed in-house media.
5. Employer must place job order with the State Workforce Agency (SWA) for a period of 30 days.
6. Regulations now require in the recruitment phase that the employer place two advertisements on two different Sundays in the area of intended employment. For professional positions, employers must now place 3 ads in forums in addition to the 2 Sunday ads. The list of recruitments sources includes: job fairs, employer's web site, campus recruiting and/or posting, trade or professional organization, use of private employment firm, employee referral program with incentives, ad in local & ethnic newspapers, radio & television ads, and web site other than employer's.
7. The PERM regulations allow the withdrawal and refiling of cases under PERM that were originally filed under the old RIR and labor certification process, so long as the withdrawal occurs prior to the placement of the job order with the SWA and the job in the re-filed case is identical to the one previously filed. However, such conversion may result in the loss of the original priority date, if DOL determines that the new PERM application is not "identical" to the prior one.

A 2007 rule requires that employers pay all PERM filing fees and costs. In addition, a Form I-140 must be filed within 180 days of PERM approval.

Note that a pending I-140 alone does not confer status.

All pending labor certifications filed prior to PERM must be evaluated to determine the benefits of, and potential supplemental recruitment required for, filing under PERM. Particular attention is being paid to visa retrogression issues affecting nationals from certain countries, including those from India, China and the Philippines.

CONCURRENT FILING

Current regulations allow I-140 petitions to be concurrently filed with the I-485 if a visa number is available at the time of filing. Visa numbers are dictated by the Department of State and published once monthly on the Visa Bulletin which can be found at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html.

VISA NUMBERS

In July of 2005, there was an unprecedented retrogression of visa numbers in the Skilled Worker (EB3) category, becoming temporarily unavailable, before falling back to March of 2001. Afterwards, there was a slow advancement until April of 2007 when the priority dates jumped forward a full year, before significantly jumping forward again in May of 2007. As of 2009 EB3s are unavailable. As this category has been volatile, it difficult to predict future movements.

WESTERN HEMISPHERE TRAVEL INITIATIVE

The Departments of State and Homeland Security announced the Western Hemisphere Travel Initiative to secure and expedite travel. The Western Hemisphere Travel Initiative requires that all U.S. citizens, Canadians, citizens of the British Overseas Territory of Bermuda, and citizens of Mexico have a passport or other accepted secure document to enter or re-enter the U.S.

US VISIT

On December 19, 2008, the U.S. Department of Homeland Security published a Final Rule in the Federal Register that expands the categories of non-U.S. citizens required to provide biometrics—digital fingerprints and a photograph—upon entry or re-entry to the United States

through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program.

Currently, certain non-U.S. citizens arriving at U.S. air, land and sea ports of entry with nonimmigrant visas or those traveling without a visa as part of the Visa Waiver Program (VWP) are subject to US-VISIT procedures. Under this final rule, all non-U.S. citizens, *except Canadians applying for admission to the United States as B-1/B-2 visitors for business or pleasure and those specifically exempted*, will experience US-VISIT procedures when entering the country. For more information visit http://www.dhs.gov/files/programs/editorial_0527.shtm.

UPL

Beware of notaries public. A notary may not confer legal advice including instructing a person to fill out a particular form. Anyone who confers legal advice who is not a licensed attorney commits the unlicensed practice of law which is a third degree felony.

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Rev. 9/09
54- Immigration Update (Eng).indd

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