VEDDER PRICE

Immigration Law Alert

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Permanent Visa Retrogression

The U.S. Department of State (DOS) issued its monthly visa bulletin for October, which lists the cutoff dates for beneficiaries of family- and employment-based immigrant visa petitions. As of October 1, 2005 (the first day of the 2006 fiscal year), early cutoff dates were imposed in the first (EB-1) and second (EB-2) employment-based immigrant visa categories for nationals of China and India, and for all countries in the third (EB-3) category. This is the first time in several years that there have been priority date backlogs in the EB-1 and EB-2 categories.

The new visa bulletin has enormous impact on individuals with pending applications for permanent residence. Employees from China and India who are the beneficiaries of approved I-140 immigrant worker petitions in the EB-1 and EB-2 categories will only be able to apply for adjustment of status to permanent residence if their priority dates occur before the dates listed. Employees in the third category, many of whom possess only a bachelor's degree, must now wait to file an adjustment of status application for at least four years, while employees born in India must now wait at least seven years. Fortunately, there are no cutoff dates for Schedule A workers (e.g., nurses and physical therapists) in the third category.

We will continue to monitor the situation affecting visa numbers, and provide updates received from the DOS.

DV Lottery

The DOS announced registration instructions for the 2007 Diversity Visa (DV) Lottery, which began on October 5, 2005. Persons seeking to enter the lottery program must register online through the designated Internet website during the registration period. The website for registering for the 2007 DV Lottery, www.dvlottery.state.gov, is available through noon (EST) December 4, 2005.

The 2007 Diversity Visa Lottery marks the third year that electronic registration is required. Paper entries and mail-in requests for Diversity Visa Lottery registration are not accepted. In response to demand, the DOS tripled the number of servers hosting the registration website this year. In addition, persons submitting entries to the 2007 DV Lottery will receive a notice of receipt containing his or her name, date of birth, country of chargeability, and a time/date stamp indicating when information was properly registered on the website.

There is no fee charged for entering the Diversity Visa Lottery. Those selected will be notified by mail only between May and July 2006. To qualify for the visa, an applicant must have a high school education or its equivalent, which is defined as successful completion of a twelve-year course of elementary and secondary education, or two years of work experience within the five years preceding the date of the application, in an occupation that requires at least two years' training or experience.

Through the DV Lottery, 50,000 permanent resident visas are available annually to persons from countries with low rates of immigration to the United States. For DV-2007, natives of the following countries are *not* eligible to apply, since they sent a total of more than 50,000 immigrants to the U.S. in the previous five years: Canada; China (mainland-born); Colombia; Dominican Republic; El Salvador; Haiti; India; Jamaica; Mexico; Pakistan; Philippines; Poland; Russia; South Korea; United Kingdom (except Northern Ireland) and its dependent territories; and Vietnam. Persons born in Hong Kong SAR, Macau SAR, and Taiwan are eligible.

Each year, millions of individuals apply for the DV program during the registration period. Therefore, selected applicants who wish to receive visas must act promptly on

their cases to ensure they receive a visa number. DV-2007 visas will be issued between October 1, 2006 and September 30, 2007. Once all of the 50,000 DV visas have been issued, the program will end for the year. For that reason, it is possible that visa numbers could be used up prior to September 30, 2007.

H-1B (Specialty Occupation) Visas—Cap Crisis

The H-1B visa allows employers to sponsor a foreign national for a temporary professional position (e.g., engineer, financial analyst, physician, graphic designer, researcher) if the foreign national has at least a bachelor's degree in the specialized field normally required for the position. However, only 65,000 new H-1B visas are available in the U.S. for each fiscal year, and on August 12, 2005, the U.S. Department of Homeland Security (DHS) announced that it had reached its quota of H-1B visas. Except in very limited circumstances, no new H-1B petitions will be accepted until April 1, 2006, for a start date of October 1, 2006. However, foreign nationals already in the U.S. in H-1B status may continue to change employers or extend their stay, regardless of whether the cap is reached.

An important recent change in the law created 20,000 additional H-1B visas for persons who have earned a master's degree or higher from a U.S. college or university. Steep new filing fees of $1500/$750 per employee (payable by employer) now apply, in addition to the regular $190 filing fee and the new one-time $500 antifraud fee.

E-3 Employment Visa for Australian Citizens

Congress has created a new work visa category for Australians that in many respects will make it one of the most attractive visas in U.S. immigration law. The new law will largely take Australians out of the H-1B quota (which has already exhausted its numbers for FY 2006) and offer them a visa that is similar to, but more flexible than, the H-1B. It also has some of the elements of an E treaty visa and can be viewed as a hybrid that should be highly useful to Australian nationals seeking to work in the U.S.

The new E-3 visa classification currently applies only to nationals of Australia, as well as their spouses and children. E-3 principal nonimmigrant aliens must be coming to the United States solely to perform services in a specialty occupation—i.e., one that requires theoretical and practical application of a body of knowledge in professional fields and the attainment of at least a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States. In order to determine what constitutes a "specialty occupation," consular officers abroad will be guided by and apply regulatory criteria already developed by the Department of Homeland Security for the H-1B classification.

The E-3 visa classification is numerically limited, with a maximum of 10,500 visas annually. Spouses and children do not count against the numerical limitation, nor are they required to be of the same nationality as the principal. A Labor Condition Application (LCA), containing attestations by the sponsoring employer related to wages and working conditions must be filed with and approved by the Department of Labor (DOL).

This visa category permits the spouse of a principal E nonimmigrant to engage in employment in the United States. As is the case for the spouse of a principal E-1 and E-2 nonimmigrant, the spouse of a qualified E-3 nonimmigrant may, upon admission to the United States, apply for an employment authorization document, which an employer can use to verify the spouse's employment eligibility. Such spousal employment may be in a position other than a specialty occupation.

L-1 (Intracompany Transferee) Visas—New Restrictions

The L-1 visa enables a U.S. employer to transfer to this country a foreign national who is currently employed by a foreign parent, subsidiary, branch or affiliate company. The foreign national may be transferred to the related U.S. company temporarily, in a managerial or executive capacity, or in a position that requires specialized knowledge of the multinational company. Effective June 6, 2005, all L-1 applicants must have worked at least one full year at a related company abroad, without exception for Blanket L beneficiaries. Additionally, a specialized knowledge worker employed in L-1B status cannot be stationed at a different employer's worksite, except in very limited circumstances. A new $500 antifraud fee applies to each L-1 petition filed after March 8, 2005.

Changes to Permanent "Green Card" Certification Program

On March 28, 2005, a new and supposedly faster labor certification process called "PERM" went into effect for sponsoring foreign national employees for permanent residence ("green card") status. PERM requires employers to test the job market before filing a permanent labor certification application. Employers will be subject to audit for up to five years after an application is approved. The PERM process anticipates approval or denial of an application within 45 to 60 days of filing. The U.S. Department of Labor has approximately 350,000 applications on file which it is adjudicating through its "backlog reduction" centers.

Conrad Waivers

October 1, 2005 marked the first day of the new fiscal year for Conrad waivers. Most foreign-born physicians who study medicine in the U.S. must return to their home country for at least two years before they can change their status and remain in the U.S. to practice medicine. Each state's department of health may approve up to 30 Conrad waivers per fiscal year for physicians who will serve in underserved or rural areas. We recommend that hospitals begin the process of applying for Conrad waivers as soon as possible for this fiscal year, since these waivers can be quite competitive in certain states, due to the demand.

Machine-Readable Passport Requirement at U.S. Borders

The DHS now requires persons traveling to the United States without a visa under the auspices of the Visa Waiver Program (VWP) to present a machine-readable passport (MRP). MRPs have two optical-character typeface lines at the bottom of the passport's biographic page to discourage fraud and confirm the passport holder's identity.

Visa Waiver travelers seeking to enter the U.S. for business or tourist visits who do not have an MRP may apply for a nonimmigrant visa at a U.S. embassy or consulate in the following countries: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

Passport Requirement Awaits Travelers in the Western Hemisphere

By January 1, 2008, travelers to and from the United States, the Caribbean, Bermuda, Panama, Mexico and Canada must have a passport or other acceptable document to enter or reenter the United States. This will apply to all U.S. citizens entering the United States from Western Hemisphere countries, and to certain foreign nationals who currently do not need a passport to travel to the United States. This requirement will be phased in on a country-by-country basis, but employers should encourage their representatives to apply now for passports if they are currently traveling on birth certificates or other documents.

DHS Increases Worksite Enforcement

A recent review of the DHS Bureau of Immigration & Customs Enforcement ("ICE") stated policies and worksite enforcement record for Fiscal Year 2004 reflect an increase in the number of ICE worksite enforcement criminal investigations. The U.S. government's comprehensive strategy for fighting illegal immigration includes worksite enforcement aimed at promoting national security, protecting critical infrastructure, and ensuring fair labor standards. ICE investigations have recently targeted employers who provide services to the federal government. Employers should be aware of potential criminal and civil penalties for the employment of unauthorized workers, and government contractors should ensure that they have an I-9 Compliance Program that includes regular self-audits.

New Filing Fees for USCIS

Effective October 26, 2005, filing fees for most petitions and applications filed with DHS increased from $5.00 to $20.00 above current rates. For example, the filing fee for

Form I-129, Petition for a Nonimmigrant Worker, will go from $185.00 to $190.00. The largest increase relates to Forms I-600, Petition to Classify Orphan, and I-829, Petition by Entrepreneur to Remove Conditions, which will both increase by $20.00.

Pending Legislation

Several bills proposing major immigration law reform have been introduced in the U.S. Congress. Some of these bills highlight increased enforcement; others address undocumented workers and workplace protections. New legislation must be approved to meet the need for more H-1B visas. Ideally, Congress should reinstate the 195,000 H-1B visas previously available annually. Concerned employers are encouraged to contact their congressional representatives to remind them that the ability to hire the best and the brightest, no matter the country of origin, helps keep U.S. businesses competitive.

If you have questions about the topics discussed in this article or U.S. business immigration laws generally, please call Gabrielle Buckley (312/609-7626), P. Michelle Jacobson (312/609-7761) or any other Vedder Price attorney with whom you have worked.

The *Immigration Law Alert* is published by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and interested parties generally informed on developments in the business immigration industry. It is not a substitute for professional advice.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with approximately 225 attorneys in Chicago, New York City and New Jersey.

The Vedder Price Business Immigration Group

U.S. companies—whether large or small—increasingly hire employees from around the globe. The search for talent within industries such as financial services, biomedical, high tech, pharmaceutical, automotive, engineering and other key sectors of the U.S. economy is relentless in its intensity. In response to the needs of companies to manage their internationally mobile workforce, the law firm of Vedder Price has created a Business Immigration Practice Group, designed specifically to serve the immigration law and compliance needs of companies throughout the country. In addition, the firm provides counsel and assistance with respect to all types of employment-related immigrant and nonimmigrant visa categories.

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- Preparation and processing of permanent resident visas for executives and other professional employees.
- Due diligence regarding immigration law issues in corporate mergers, acquisitions, divestitures, and other forms of corporate reorganization.
- Counseling employers regarding compliance with immigration laws (IRCA) in order to avoid civil and criminal penalties.
- Assisting in processing visa applications and resolving other State Department matters in U.S. Embassies and Consulates around the world.
- Assisting employers with their non-U.S. immigration needs through our network of attorneys licensed in other countries.

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