VEDDER PRICE

Immigration Law Alert

March 2007

TEMPORARY WORKERS ALERT: Time to File H-1B Petitions for FY 2008!

U.S. employers may begin filing for H-1B visa numbers for professional employees **on April 1, 2007** for an October 1, 2007 start date. Due to increasing demand for these visa numbers, we expect all available H-1B visa numbers to be taken within the first few days or weeks of availability, absent congressional action. As many employers know only too well, the 65,000 regular H-1B visas for FY 2007 were taken by May 2006, and the additional 20,000 reserved for U.S. master's degree holders were gone by July 2006. Consequently, there have been no new H-1B visa numbers available since mid-2006. Employers of graduating students should look closely at the expiration dates for Optional Practical Training and should file for H-1B status in April 2007 to ensure there are H-1B visa numbers available for these newest employees as well.

H-2B Visas for Seasonal Workers

The hospitality industry relies on H-2B visas for skilled and unskilled seasonal or peak load workers. These include groundskeepers, maintenance personnel, cooks, and many other hotel and restaurant workers. The quota for these visas was exhausted on December 4, 2006. We can begin filing new H-2B petitions on April 1, 2007, when another 33,000 H-2B visas will be available. Again, absent congressional action, we expect that only employers filing in April 2007 will be able to obtain these visas.

Reminder—Exceptions to the Quotas and Caps

Workers now in the U.S. in H-1B status are exempt from the cap if a new employer hires them or they apply to extend their stay. Workers who have previously utilized the H-2B program are also exempt from the H-2B cap. Other organizations, including not-for-profits and institutions of higher learning, remain exempt from the caps and quotas.

New Benefits for Athletes and Ice Skaters

Although unable to come to a consensus regarding the 12 million undocumented workers in the U.S., Congress found time in December 2006 to pass the Creating Opportunities for Minor League Professionals, Entertainers, and Teams through Legal Entry (COMPETE) Act of 2006. The COMPETE Act enlarges the scope of P-1 nonimmigrant visas to include: (1) a professional athlete; (2) a person who performs as an athlete, a coach, or part of a team that is located in the U.S. and is a member of certain amateur foreign leagues or associations from which a significant number of individuals are drafted by major sports leagues or their minor-league affiliates; and (3) a professional or amateur athlete who performs individually or as part of a group in a theatrical ice skating production touring the United States.

Immigration Enforcement

Increased Worksite Enforcement of Immigration Laws

The press has widely reported worksite raids conducted by Immigration Customs and Enforcement (ICE), the enforcement arm of the Department of Homeland

Security (DHS). In December 2006, ICE agents raided Swift & Company worksites in six states, taking into custody almost 1,300 employees—10% of Swift's manufacturing workforce. Swift has announced that it suffered damages in excess of $30 million due to these raids. More troubling, Swift was participating in the DHS Basic Pilot Program, which should have provided a relatively safe harbor for the company.

ICE has already initiated a change in the way it approaches enforcement of the immigration laws. Rather than relying on the traditional use of administrative fines for I-9 violations, ICE is bringing criminal charges against employers and seizing their "illegally derived" assets. Last fiscal year, this new approach resulted in 127 criminal convictions, 716 employers arrested on criminal charges, and 3,336 administrative workplace arrests. More employers also are being charged with money laundering and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), which can result in prison sentences of up to 20 years. In fact, on February 26, 2007, the U.S. Supreme Court cleared the way for employees to bring a RICO action against Mohawk Industries, Inc.

- In 2006, ICE announced the arrest of four construction supervisors and 76 foreign national workers at construction sites in Kentucky. Each of the four construction supervisors has been charged in a criminal complaint with aiding and abetting and harboring illegal aliens for commercial advantage or private financial gain. The maximum punishment for these crimes is 10 years imprisonment, a fine of $250,000, or both.

- The owner of an Indiana business that performs stucco-related services at construction sites in seven Midwestern states was charged with money laundering, harboring illegal aliens, transporting illegal aliens, and making false statements in connection with an illegal employment scheme. The defendant faces up to 40 years in prison, and ICE is seeking forfeiture of $1.4 million.

- ICE agents arrested seven IFCO Systems managers, charging them with harboring illegal aliens for financial gain. ICE agents arrested 1,187 foreign national IFCO employees during warrant and consent searches executed at more than 40 IFCO locations nationwide.

Competitors/Employees Using Immigration Violations as a Basis for Lawsuits

Many lawsuits have been filed against employers by competitors who believe unlawful hiring practices may enable the companies to undercut competitors by using illegal workers. A $1.3 million settlement was recently reached in a suit based on anti-racketeering laws filed by a company's employees, who claimed that their employer depressed wages by hiring undocumented workers. A similar suit has been filed by workers against Mohawk Industries in Georgia.

Tools for Ensuring Compliance with Immigration Laws

Employers should have an immigration compliance policy in place that ensures corporation-wide compliance with I-9 record-keeping and immigration laws. The policy should identify a compliance officer, ensure employee training and require regular internal audits. Congress is drafting legislation that would set up an "electronic verification" system for all employers based on Social Security Administration data, but until then the I-9 system remains in place.

IMAGE Program

On July 26, 2006, U.S. Immigration and Customs Enforcement (ICE) announced a new program named IMAGE (ICE Mutual Agreement Between Government and Employers) designed to facilitate employer compliance with employment eligibility verification regulations. The IMAGE initiative seeks to accomplish greater industry compliance and corporate due diligence through enhanced federal training and education of employers.

Employers who participate in IMAGE will be expected to undergo audits of their employment eligibility verification practices, use the long-established Basic Pilot Employment Verification Program to verify employees' work eligibility, and follow certain best practices. These employers would be granted the "IMAGE Certified" mark of agency approval that is intended to act as an industry standard. However, ICE would have access to a great deal of employer and employee data. To date, only a handful of companies have entered into IMAGE agreements with ICE.

Social Security No-Match Letters

On June 14, 2006, ICE issued proposed regulations describing the obligations of an employer who receives a no-match letter from the Social Security Administration or the Department of Homeland Security. The proposed regulations set out safe-harbor procedures that an employer can follow in response to such a letter. The central issue addressed under these regulations is whether receipt of such a letter constitutes "constructive knowledge" that the employee has no work authorization. ICE contends that, by following its guidance outlined in the proposed regulation, the employer's liability will be minimized.

ICE's proposed regulation broadens the definition of "constructive knowledge" to include instances where the employer fails to take prompt action upon receipt of a no-match letter. To take advantage of the safe-harbor procedures, an employer must check its records promptly upon receipt of a no-match letter and take additional steps within mandated time frames.

Until the final regulation is implemented, we advise employers to continue to maintain adequate I-9 record-keeping practices and an outlined internal policy that allows management to review the totality of circumstances when deciding how to respond to a no-match letter.

State Laws

Colorado Passes Law Requiring Employers to Verify Work Authorization

Over 400 pieces of legislation have been introduced by state legislatures designed to further regulate the employment of foreign nationals. This legislation would generally increase penalties on employers who hire unauthorized workers, prohibit granting government contracts to employers with unauthorized workers and allow state agencies to enforce immigration laws. Although it is probable that these statutes will be found unenforceable due to constitutional or federal preemption issues, we recommend that, in the interim, employers make a good-faith effort to comply with these laws.

One such law relating to employment went into effect in Colorado on January 1, 2007. The basic requirement of the statute is that after January 1, 2007, within 20 days after hiring a new employee, each employer in Colorado "shall affirm that the employer has examined the legal work status of such newly hired employee and has retained copies of the documents required by 8 U.S.C. § 1324a; that the employer has not altered or falsified the employee's identification documents; and that the employer has not knowingly hired an unauthorized alien. The employer shall keep a written or electronic copy of the affirmation, and of the documents required by 8 U.S.C. § 1324a, for the term of employment of each employee." The Director of the Division of Labor in the Colorado Department of Labor and Employment may conduct random audits or request documentation demonstrating that the employer is in compliance with the law.

Processing Issues

Premium Processing Service for Permanent Resident Petitions

Since 2001, U.S. Citizenship and Immigration Services (USCIS) has been offering premium processing service (PPS) as an avenue for speeding processing of nonimmigrant petitions. For a fee of $1,000, the government "adjudicates" petitions within 15 calendar days of receipt.

As of September 25, 2006, USCIS now offers PPS for the following types of Employment Based Permanent Residence (Green Card) petitions:

- EB-1 Outstanding Professors and Researchers and Individuals of Extraordinary Ability*
- EB-2 Members of Professions with Advanced Degrees or Exceptional Ability (excluding, however, those seeking a National Interest Waiver)
- EB-3 Professionals, Skilled Workers, and Unskilled Workers

**Please note that PPS is not yet available for EB-1 Multinational Managers and Executives.*

For many individuals in the EB-2 category and all individuals in the EB-3 category, PPS processing of Employment Based Immigrant Petitions will not speed up the final grant of permanent residence due to the backlog in immigrant visas, but other advantages to Premium Processing include three-year extensions of H-1B status after the sixth year and a better ability to take advantage of AC21 portability.

USCIS Proposes Large Fee Increases

USCIS has proposed a rule increasing filing fees for many immigration-related forms. In addition to raising fees, the rule proposes to merge the fees for certain applications so applicants will pay a single fee rather than paying several fees for related services. There is a 60-day comment period on the proposed rule, and the increases are not expected to take effect until at least six months after publication.

Some of the business-related forms that will be affected by the proposed increases, and their current and proposed fees, include:

- I-129, Petition for a Nonimmigrant Worker: current, $190; proposed, $320.
- I-140, Immigrant Petition for Alien Worker: current, $195; proposed, $475.
- I-485, Application to Register Permanent Residence or Adjust Status: current, $325; proposed, $905 for applicants 14 years of age or older (except certain refugees).
- I-765, Application for Employment Authorization: current, $180; proposed, $340.
- N-400, Application for Naturalization: current, $330; proposed, $595.

Comments on the proposed rule (Docket No. USCIS-2006-0044), which was published in the *Federal Register* on February 1, 2007, should be sent to USCIS by April 2, 2007.

Health Care Industry

Physicians for Underserved Areas Act Legislation

On December 9, 2006, the Senate passed the Physicians for Underserved Areas Act (H.R. 4997), which was then signed into law. The bill extends for two years the Conrad 30 waiver program that allows foreign doctors working in underserved areas to remain in the country after completing their medical training. Normally, J-1

visa holders who come to the U.S. for graduate or medical education are required to leave the country for two years before applying to return. The Conrad 30 program waives that requirement for foreign physicians who agree to spend three years working with patients in medically underserved areas.

Nursing Relief for Disadvantaged Areas Reauthorization Act

On December 6, 2006, the Senate passed the Nursing Relief for Disadvantaged Areas Reauthorization Act of 2005 (H.R. 1285). This bill extends for three years the Nursing Relief for Disadvantaged Areas Act of 1999, which provides for up to 500 foreign nurses to come to the U.S. annually on H-1C visas to work in medically underserved areas.

U.S. Citizen/North American Traveler Alert

Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative went into effect on January 23, 2007, requiring citizens of the United States, Canada, Mexico, and Bermuda to present a passport to enter (or re-enter) the United States *when arriving by air* from any part of the Western Hemisphere. U.S. citizens will need a passport to enter the United States by air from Canada, Mexico, Bermuda, South and Central America, and the Caribbean. Other forms of identification are currently acceptable, but security concerns have resulted in the passport requirement.

U.S. citizens may apply for U.S. passports by visiting the State Department's travel Web site at www.travel.state.gov or calling the U.S. National Passport Information Center at (877) 4USA-PPT; TDD/TTY: (888) 874-7793. Additionally, instructions for obtaining a passport are available through the U.S. Postal Service at www.usps.com/passport/. Travelers should allow several weeks for passport processing, though expedited processing of passport applications for travelers with immediate international travel requirements is also available.

Advocacy Issues

Many employers have been inconvenienced by the lack of H-1B and H-2 visas, as well as the tremendous backlogs for permanent visas. Without congressional action, U.S. employers in need of highly educated foreign professionals with critical skills will have to wait months and even years to obtain this needed expertise.

Many employers have begun to contact their congressional representatives to urge them to support comprehensive immigration reform, including an increase in H-1B visas, reduction of the permanent resident backlog, and a reasonable guest worker program that will help businesses. American business needs a comprehensive immigration system that channels the forces of the marketplace to improve America's competitive advantage while ensuring our national security. For those of you interested in contacting your congressional representatives, below please find a link which can be used to communicate your needs to Congress.* Even if your congressman or senator supports immigration reform, it is important that they hear from businesses and employers in their districts, as they are certainly hearing from those who oppose immigration reform.

* http://capitoladvantage.com/capwiz/

Late Breaking News

The U.S. Department of State has issued an alert that Greek passports issued before January 1, 2006 (except for diplomatic passports) are no longer considered valid for travel to the United States. Greek nationals should contact their nearest police precinct or the Greek Police/Passports (DIED) website at http://www.passport.gov.gr to obtain a new valid passport.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national full-service law firm with approximately 240 attorneys in Chicago, New York, Washington, D.C. 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.

Specific services include:

- Determining and applying for the most appropriate visa categories for individuals who intend to stay temporarily in the United States for employment or other business-related reasons.
- 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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