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CLIENT ALERTS

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SPECIAL CLIENT ALERT

The State Department ("DOS") and Department of Homeland Security ("DHS") have advised that, commencing on June 26, 2005, all travelers using the Visa Waiver Program ("VWP") must possess machine readable passports to enter the United States. The U.S. Citizenship and Immigration Services ("USCIS") announced that the additional 20,000 H-1B nonimmigrant visa numbers created by the H-1B Reform Act of 2004 would be available to graduates with advanced degrees from American universities on May 12, 2005, and proposed to extend the time for filing O and P petitions up to one year prior to the need for services. In early May, the Congress passed and the President signed an $82 billion appropriations bill that contained a number of immigration-related provisions addressing, among other areas, the quota limitations for the H-2B nonimmigrant classification, the backlogs for immigrant visas in the third preference area, the ability of Australian professionals to enter the United States, and the security features necessary for driver's licenses issued to foreign nationals. In this Special Alert, we shall review these and other significant developments and discuss the implications for all employers of foreign nationals.

I. Passport Requirements for Visa Waiver Travelers

On May 12, 2005, the DOS and DHS announced that all foreign nationals seeking admission to the United States under the VWP on or after June 26, 2005 must present a machine-readable passport. These are passports that include two optical-character, typeface lines at the bottom of the biographic page that can be machine-read and enable the airport inspectors to verify the passport holder's identity quickly and efficiently. Originally, the deadline for this requirement was October 1, 2003. However, many foreign countries requested an extension of this deadline because they lacked the technology to generate machine-readable passports. In response, the DOS and DHS extended the deadline until June 26, 2005.

This requirement should come as no surprise for frequent VWP travelers. The immigration and customs inspectors at the various ports-of-entry have been passing out notices to travelers about this requirement since October 26, 2004. those who lack these machine-readable passports will not be allowed admission to the United States under the VWP unless they have secured a visitor's visa prior to their application for admission. *As a result, all business travelers who lack machine-readable passports must apply for and obtain a visitor's visa for any trips on or after June 26, 2005.*

Please note that the DOS/DHS requirement for a machine-readable passport is separate from the other requirements issued by these agencies relating to passports with biometrics. Last year, we reported that the DOS/DHS had extended this deadline until October 26, 2005. After that date, foreign nationals will not be allowed to use the VWP unless their passports also contain biometric identifiers. Those whose passports lack these biometrics also must first apply for and obtain a visitor's visa to secure admission to the United States on or after October 26, 2005.

II. The USCIS Implements the H-1B Reform Act

On May 5, 2005, the USCIS finally published interim regulations implementing the H-1B Reform Act that was passed late last year and scheduled to take effect on March 8, 2005. As part of this legislation, Congress made available 20,000 new H-1B visas annually to those foreign nationals who had obtained at least a master's degree from a U.S. academic institution. This was designed to alleviate, in part, the hardships caused by the overall H-1B quota which was reached for this fiscal year before the fiscal year ever started! As a result, there have been no new H-1B visas available since October 1, 2004.

In its new regulation, the USCIS established May 12, 2005 as the first date on which applications for these additional 20,000 visa numbers would be accepted. All applications for these visas must be filed at a separate address with the Vermont Service Center ("VSC"), and a computer lottery will be held in the event that the VSC receives more than 20,000 applications on that date. Those applications that are not included in this year's 20,000 allotment will automatically be included in the quota for fiscal 2006, which starts on October 1, 2005, unless the employer objects. Those employers who seek to take advantage of these additional 20,000 visa numbers obviously should file their petitions as soon as possible. Even those who cannot because their employees lack master's degrees from U.S. universities are well advised to file promptly for inclusion in the FY 2006 quota which may be filled shortly based on last year's experience.

The H-1B Reform Act also revived the concept of the H-1B Dependent Employer that lapsed in October 2003. As a result, those employers who exceed the limits on H-1B employees set forth in the statute will have to file enhanced Labor Condition Applications that attest that employment of the H-1B employee will not cause primary displacement of an American worker from the employer's payroll or secondary displacement from another employer's workforce if the H-1B worker will be placed at that other worksite. Employers who are "H-1B Dependent" or who will use employees from H-1B Dependent employers must exercise extreme caution to ensure that these provisions of the H-1B Reform Act are satisfied.

III. USCIS Proposes to Expand the Time for Filing O and P Petitions

On April 28, 2005, the USCIS published a proposed rule that would allow employers to file new O and P petitions up to one year before they need the foreign national's services. See 70 Fed. Reg. 21983-85 (April 28, 2005). The O and P nonimmigrant classifications include foreign nationals with extraordinary ability in the arts, sciences, business or athletics, as well as internationally recognized athletic team members, entertainment groups, artists and other entertainers. Under current law, O and P petitions for these individuals and groups cannot be filed until 6 months before the services are needed and the USCIS's processing delays have caused significant problems in this area.

The USCIS proposal noted that a large percentage of the O and P petitioners seeking foreign nationals to perform or participate in athletics often plan well in advance for these events and that there is a substantial amount invested in the timely appearance of these individuals. In this context, the USCIS believes that extending the time for filing these petitions will assist the affected industries to better plan their events and lead to less disruption at the last minute. Comments on the proposed rule are due by June 27, 2005.

IV. President Bush Signs New Immigration Legislation

On May 11, 2005, President Bush signed the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, for the Fiscal Year Ending September 30, 2005, and for Other Purposes."(The "2005 Appropriations Act"). While basically an appropriations bill, this new legislation contains several important immigration-related provisions.

A. H-2B Relief: The H-2B nonimmigrant classification applies to skilled or unskilled short-term or seasonal workers that are in short supply in this country. It is subject to an annual cap of 66,000, which also was reached early into this fiscal year and which has had significant adverse impacts on the hospitality and other industries that rely heavily on this category.

The 2005 Appropriations Act contains a bill entitled the "Save our Small and Seasonal Businesses Act of 2005 ("SSSBA"). This legislation was intended to and has provided relief to those businesses and industries that rely on H-2B nonimmigrants as a ready supply of short-term labor to work during periods of peak seasonal need. The legislation does not increase the quota but exempts from this cap all H-2B workers who have worked here in this category within the past three years, and who are returning to work for the same employer. The legislation also attempts to spread out the issuance of H-2B nonimmigrant visas by restricting issuance of 50% of the H-2B numbers to the first half of the fiscal year, while reserving the balance for the second half of the year. Earlier this year the USCIS published proposed regulations that would transform the current two-step application procedure into a one step attestation-based process, but there has been no action on this proposal to date.

B. Immigrant Visa Backlogs: The 2005 Appropriations Act also helps reduce the backlogs that have developed recently in the third employment-based preference category for nationals of India, China and the Philippines. As our readers know, these categories recently became oversubscribed and retrogressed. This has generated significant hardships for foreign nationals from these countries who are ready to apply for permanent residence but cannot due to the absence of an available visa.

The 2005 Appropriations Act partially addresses this problem by permitting recapture of approximately 50,000 visa numbers that went unused during fiscal years 2001-04 for those foreign nationals whose permanent residence applications are based exclusively on Schedule A occupations. This, of course, does little to help those foreign nationals with approved individual labor certification applications who seek permanent residence in the EB-3 category. It does, however, appear to provide meaningful relief for the health care industry because nurses and physical therapists are on Schedule A and will benefit from this relief.

C. The New E-3 Nonimmigrant Classification for Australians: The 2005 Appropriations Act also creates a new E-3 nonimmigrant classification that establishes 10,500 additional visas for Australian professionals and thus enables them to avoid the quota problems that have plagued the H-1B nonimmigrant classification the past few years. To qualify, the employer must demonstrate that the prospective employee is an Australian citizen, that s/he will engage in the type of "specialty occupation" that satisfies the H-1B requirements, and that a labor condition application has been approved for the position. Unlike the more traditional E nonimmigrant classifications, there is no requirement that the employer be primarily Australian owned or that it satisfy the other treaty investor or treaty trader requirements. Spouses of these E-3 nonimmigrants should be able to secure employment authorization once they arrive in this classification. Neither the USCIS nor the DOS has announced when applications will be accepted for this E-3 classification or how they will be processed.

D. The "Real ID Act": Finally, the 2005 Appropriations Act contains legislation called the Real ID Act, which raises the burdens on those seeking asylum, includes provisions that drastically restrict judicial review, and prevents states from issuing driver's licenses to foreign nationals who cannot prove they are here legally. The additional restrictions on the issuance of driver's licenses promises to complicate what has already become an extremely difficult process, even for those foreign nationals who are here legally, due to the relative unfamiliarity of the state motor vehicle departments with federal immigration requirements and the documents that evidence lawful status in this country.

V. The L-1 Reform Act

As we have noted in prior alerts, the L-1 Reform Act is scheduled to take effect on June 6, 2005. This legislation prohibits L-1B "specialized knowledge" personnel from working primarily at a worksite, other than the petitioning employer's, if the work will be controlled and supervised by a different employer or if the offsite arrangement is essentially to provide labor for hire, rather than service related to the specialized knowledge functions for the petitioning employer. It also requires all L-1 blanket transfers to have at least one year of continuous prior experience with the employer abroad within the past three years, rather than the six months required under current law. The new legislation applies to L-1 petitions filed on or after June 6, 2005. It does not apply to extensions and amendments for individuals already here in L-1 status.

We believe that employers should take at least three actions in response to the approaching effective date of this legislation. First, those with blanket L petitions should determine whether they have any employees who would qualify under the current six month rule so that they can get them here before the new law takes effect. In this regard, employers must be careful because these employees will not be eligible for priority worker classification if they apply for permanent residence since they lack the year's experience abroad required by that preference category.

Second, employers who use contract labor need to evaluate these relationships against the independent contractor definitions in the immigration or other laws to determine if they would be considered a "joint employer" of the contract personnel. Such a relationship might exist if the employer maintained control and supervision of the employment relationship. In such circumstances, these joint employers may have an obligation to make sure that there are no L-1B employees on their site whose work violates the L-1 Act. Finally, employers using contract labor or independent contractors should review their contracts with these workers or the vendors that supply them to ensure that they contain provisions that will protect them from legal violations committed by these workers or vendors.

VI. The Secure America and Orderly Immigration Act of 2005

On May 11, 2005, Senators McCain, Kennedy, Kolbe, Flake and Gutierrez introduced "The Secure America and Orderly Immigration Act of 2005" into the Senate to kick off the debate about immigration reform. This proposed legislation, if adopted, would increase border security initiatives, including information-sharing, international and federal-state-local enforcement coordination, technology, anti-smuggling and other actions, authorize reimbursements to states forced to incarcerate undocumented aliens convicted of crimes, create an "Essential Worker" (H-5A) nonimmigrant classification for foreign workers who are needed to fill unskilled positions and a new H-5B temporary visa category for undocumented workers that ultimately will permit these foreign nationals to secure permanent residence, establish an electronic work authorization system to replace the current I-9 process, and add additional immigrant visa numbers to the family-based quota to promote family unification. As you know, the topic of immigration is a controversial one in the country so it is too early to predict the eventual outcome of this legislation.

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If you have any questions about these issues or any other developments in the immigration area, you can contact: **Robert S. Groban, Jr.**, the head of our Immigration Law Group, in the **New York** office at **212/351-4689,** or **rgroban@ebglaw.com**. You also may contact; **Elise Healy**, the immigration partner in our **Dallas** office, at **214/397-4345,** or **ehealy@ebglaw.com;** or **William Poole,** the immigration partner in our **Atlanta** office, at **404/923-9035,** or **wpoole@ebglaw.com.**