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IMMIGRATION ALERT:

USCIS Reaches FY 2006; DOS Announces Severe Visa Regressions; DOS Implements E-3 Category; DOS Implements Online System To Check Passport Applications; DOL Reports On Backlog Reduction Efforts

The U.S. Citizenship and Immigration Services ("USCIS") announced on August 12, 2005 that the quota for new H-1B petitions in fiscal 2006 had been reached on August 10, 2005. The Department of State ("DOS") Visa Bulletin for October 2005 shows severe regressions in the EB-1 and EB-2 preferences for China and India. The DOS also issued a final rule on September 2, 2005 that implemented the new E-3 visa application for Australians, and introduced an on-line status check system for passport applicants. The Department of Labor ("DOL") reported on the present status of RIR and traditional cases pending at the two Backlog Reduction Centers ("BRC"). Finally, the USCIS announced that it will refrain for at least 45 days from instituting civil enforcement actions against employers who hire victims of Hurricane Katrina. In this Special Alert, we shall review these and other significant developments and discuss the implications for all employers of foreign nationals.

I. USCIS Reaches H-1B Quota for Fiscal 2006 in Record Time

USCIS announced on August 12, 2005 that it had received sufficient H-1B petitions by August 10, 2005 to reach the normal H-1B quota for fiscal 2006. This does not include the 20,000 additional H-1B visa numbers reserved for applicants with master's degrees or higher from U.S. universities. H-1B visas remain available in this separate category for both fiscal 2005 and 2006. In addition, the USCIS reported that it may not be able to adjudicate all the H-1B petitions received on August 10, 2005, and will use a random lottery to select which of the applications received on that date cannot be processed due to the H-1B cap.

II. DOS October Visa Bulletin Reports Severe Regressions

The October 2005 Visa Bulletin issued by the DOS reports that there has been a severe visa regression in the EB-1 and EB-2 preference categories for Chinese and Indian nationals. This follows prior DOS

announcements that closed the EB-3 preference category for all foreign nationals for fiscal 2005. The employment-based permanent residence process consists of several steps. The last step in this process is the actual permanent residence application, but this cannot be filed unless there is a visa number available for the applicant. By law, there is a quota limit of 140,000 on the number of employment-based applications that can be approved during each fiscal year. This includes both an overall quota as well as a quota that applies to each country. The “regression” in the visa numbers for fiscal 2005 effectively precludes all foreign nationals from filing employment-based Third preference permanent resident applications, and prevents Chinese and Indian nationals from applying for permanent residence in the First, Second or Third employment-based preference categories.

Ironically, the DOS reports that this regression resulted in large part due to the success of backlog reduction efforts by the USCIS. Each time the USCIS approves an application for permanent residence it uses an employment-based visa number. By adjudicating significantly more permanent residence applications, the USCIS has depleted the overall number of employment-based visas more than the DOS anticipated. The October 2005 Visa Bulletin reflects the DOS efforts to stop new filings by Chinese and Indian nationals in the EB-1, EB-2 and EB-3 categories because the visa numbers for fiscal 2005 have been exhausted.

The DOS announcement makes it important for Indian and Chinese foreign nationals eligible to apply for permanent residence in the EB-1 and EB-2 employment-based categories to submit these applications so that they are received by the USCIS by September 30, 2005. In addition, those Indian and Chinese foreign nationals who contemplated seeking permanent residence abroad via consular processing also may want to consider filing permanent residence applications with the USCIS by September 30 so that they will be accepted prior to the regression.

The long-term impact of these regressions remains to be seen. The federal government’s 2005 fiscal year ends on September 30. Fiscal 2006 begins on October 1, 2005, and this will result in a new supply of employment-based visa numbers. The DOS estimates that the heavy demand for employment-based visa numbers will continue in fiscal 2006, and may continue to result in early cut-off dates in the EB-3 category for applicants from Mexico, China, India and the Philippines, and in the EB-1 and EB-2 categories for applicants from India and China. These cut-off dates are likely to appear shortly after the beginning of the 2006 fiscal year and this may leave a small window of opportunity to file these cases in October and November 2005.

While these developments will prevent many eligible foreign nationals from filing for permanent residence, the impact on those in H-1B nonimmigrant status should not be catastrophic. There is a limit of six years on the time an H-1B nonimmigrant can spend here in that status. Theoretically, the regression might place pressure on these foreign nationals since they may not be able to apply for permanent residence before their H-1B time limit expired. The American Competitiveness in the 21st Century Act (“AC-21”), however, contains two significant provisions that ameliorate this result. First, it permits those H-1B nonimmigrants who are the beneficiaries of labor certification applications or preference petitions filed more than 365 days before H-1B status expires to obtain

annual extensions beyond six years. Second, it allows these H-1B nonimmigrants to extend their H-1B status indefinitely if they have an approved preference petition and cannot apply for permanent residence due to the regression in visa numbers. Advanced planning by employers to take advantage of these AC-21 provisions should reduce significantly the disruption that the visa regression otherwise would have.

III. The DOS Implements the E-3 Nonimmigrant Category

The 2005 Appropriations Act created a new E-3 nonimmigrant classification that established 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 will be able to secure employment authorization once they arrive in this classification. On September 2, 2005, the DOS published a final rule implementing the E-3 nonimmigrant classification so that this visa classifications now is available to Australians.

IV. The DOS Implements Online Status Checks for Passport Applications

Effective August 12, 2005, the DOS has introduced a new online system that permits passport applicants to check the status of their applications. The web site is: http://travel.state.gov/passport/get/status/status_2567.html. Those wishing to use the system must input their name, date of birth, and the last four digits of their social security number. This personal information will not be retained in the system any longer than necessary to check the status of the passport application.

V. The DOL Reports on Backlog Reduction Efforts

The DOL has reported the progress of the efforts of its two BRC’s to incorporate RIR and traditional labor certification applications into their data systems, and to start processing these applications. Approximately 350,000 of these labor certification cases were pending on March 28, 2005, when the PERM regulations became effective. 345,000 of these cases were transferred immediately to the BRC’s. Approximately 5,000 remained in the New York and San Francisco State Labor offices for additional processing, and those that are not completed will also be transferred to the BRC’s at the end of the year when the federal funding for these state activities expires.

The BRC’s report that they have completed partial data entry for 90% of the cases that they have received. This permits them to confirm the filings so that H-1B nonimmigrants will be able to secure the confirmation they need for seventh year extensions. The BRC’s, however, must complete the data entry to send out the “45-day” letters that employers must return before these cases can be put in line for processing. The DOL still estimates that this data entry will not be completed before the end of the year. In the meantime, the BRC’s report that they are processing

RIR and traditional cases but only where the recruiting was completed before the transfer. In the coming months, the BRC’s will work out the procedures necessary to process the others. As we previously reported, all cases shall be processed based on the date of original filing.

VI. The USCIS Advises on Hurricane Katrina Victims

Following the devastation and dislocation caused by Hurricane Katrina, the USCIS and other agencies issued guidance on how they would respond to the unique situation that has resulted. On September 6, 2005, the USCIS announced that it will not seek civil sanctions for the next 45 days from employers who hire hurricane victims that lack the documentation required to satisfy the Form I-9 requirements. Employers still must have the employees complete Section 1 of the Form I-9 but they need not review the employees' documents if they are not available.

The Department of Homeland Security added a section to its web site that provides additional information that hurricane victims can use. It appears at: <http://www.dhs.gov/interweb/assetlibrary/katrina.htm>. This web site explains how to secure assistance, provides health-related information, instructs how to find relatives, and contains additional useful information. At the same time, the troubled Federal Emergency Management Agency ("FEMA") established a web site that contains additional information for hurricane victims, including "Q&A's" that explain the limited types of assistance available to undocumented aliens. This web site can be found at: <http://www.fema.gov/press/2005/katrinarecovery.shtm>.

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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 ehaly@ebglaw.com; or **William Poole**, the immigration partner in our **Atlanta** office, at **404/923-9035**, or wpoole@ebglaw.com.

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