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IMMIGRATION ALERT:

USCIS Reports on H Quota Numbers; DOS: Progress on E-3 Nonimmigrant Category; Passport Requirements; DOL: Problems with PERM; PERM Impacts Employers; and Recent Decisions

The U.S. Citizenship and Immigration Services ("USCIS") announced that the H-1B quota numbers for fiscal 2006 are running out. The Department of State ("DOS") has indicated that it will be ready to process the new E-3 visas for Australians in approximately three months, and that eligible foreign nationals will be precluded from using the Visa Waiver Program ("VWP") after October 25, 2005 if they lack passports that are machine-readable and contain a digital photograph. The Department of Labor ("DOL") reported that numerous erroneous denials had been issued under its new PERM labor certification program and that it was working to correct the software and other problems that led to these errors. Finally, there were several recent decisions and other immigration-developments in the courts and DOL Review Board that affect the way in which companies should do business. In this Special Alert, we shall review these and other significant developments and discuss the implications for all employers of foreign nationals.

I. USCIS Reports on H Quota Numbers

USCIS reported on July 31, 2005 regarding the number of new visas available under the various H nonimmigrant categories. In the H-1B classification, the USCIS indicated that it had approved 21,252 new H-1B petitions and received an additional 27,788 new petitions. The USCIS can approve 58,200 new H-1B petitions annually so this only leaves 9,160 H-1B visa numbers left before the cap for fiscal 2006 is reached. This does not include up to 6,800 H-1B visas that can be issued under the Free Trade Agreements with Chile and Singapore and thus must be counted against the total H-1B cap of 65,000 per year. It also does not include the 20,000 additional H-1B visa numbers reserved for applicants with master's degrees or higher from U.S. universities. In this category, the USCIS announced that it had used up approximately 10,000 toward the 2005 quota limit and 11,000 toward the 2006 cap. Under these circumstances, we advise all employers to file their new H-1B petitions as soon as possible, especially

for those F-1 students working pursuant to post-graduate practical training since their employment authorization probably will expire before they will become eligible for new H-1B visas under the FY 2007 quota which begins on October 1, 2006.

In our previous issues we reported that 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"), which contained several immigration-related provisions relating to the various nonimmigrant categories. One of these provisions allocated 50% of the 66,000 visas available under the H-2B classification to each half of the government's fiscal year. The USCIS reported that approximately 16,000 of the available 33,000 visas were used during the first part of fiscal 2005 and that almost all of the 33,000 allocated for the second half of fiscal 2005 are still available.

II. DOS Reports Progress on E-3 Nonimmigrant Category

In our previous issues we reported that the 2005 Appropriations Act also created a new E-3 nonimmigrant classification that established 10,500 additional visas for Australians who satisfy the H-1B definition of a "professional" and who thus will be able to avoid the quota problems that have plagued the H-1B nonimmigrant classification the past few years. The DOS recently indicated that regulations implementing the E-3 classification have been drafted and are undergoing interagency review, and that it expects to be able to accept E-3 visa applications in approximately two to three months.

Under the 2005 Appropriations Act, employers seeking to use the E-3 classification must first secure an approved Labor Condition Application ("LCA") in the same manner as H-1B employers. On July 19, 2005, the DOL advised employers seeking to secure E-3 visas that they must use the current ETA Form 9035 for H-1B LCA's and annotate it "E-3–Australia–to be processed" at the top of each page. All E-3 LCA's must be filed with the DOL's national office.

III. 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.

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. Recently, the Bush administration again changed this deadline. Now, all foreign nationals seeking to use the VWP after October 25, 2005 must have passports that also contain a tamperproof digitalized photograph. One year later, starting on October 26, 2006, foreign nationals will not be allowed to use the VWP unless their passports also contain an integrated circuit chip capable of storing biometric identifiers. Those whose passports lack these chips will first have to apply for and obtain a visitor's visa to secure admission to the United States.

IV. The DOL Reports Continuing Problems with PERM

The DOL implemented its long awaited PERM program for labor certification on March 28, 2005. Since that time, the program has been plagued by start-up problems common to any new technology. Due to errors in the PERM decision logic, many cases have been rejected by the DOL that it concedes should have been accepted for processing. Still more have been denied for reasons that the DOL concedes are clearly erroneous. This has created much confusion with PERM that we do not expect to be resolved until the fall.

Once the DOL gets its software act together, PERM promises a much prompter and consistent adjudication process for those cases eligible for PERM consideration. Lost in the allure of this promise, however, is the distinct possibility that many cases will be denied under PERM that would have been approved under the old RIR or traditional systems. Moreover, due to regressions in the third employment-based preference and possible regressions in the second employment-based preference for India, China and the Philippines that the DOS projects for later this year, it is possible that speedier adjudications of these labor certification applications actually will force many H-1B employees to depart the United States because they will be unable to file for permanent residence or secure extensions of their H-1B status beyond six years. For these and other reasons, we continue to urge employers to exercise extreme caution in responding to the inevitable employee clamor to “convert” their slower labor certification applications filed prior to PERM to PERM cases. These cases must be reviewed carefully on a case-by- case basis, and employees will be required to execute written waivers if they insist on proceeding despite advice to the contrary.

V. PERM Forces Employers to Rethink Immigration Support Policies

The speed with which employees now may be able to secure alien employment certification and file applications for permanent residence is forcing many employers to rethink the financial and other support they provide to their foreign nationals seeking permanent residence. Prior to PERM, it could take years for a labor certification application to be approved by the DOL and the employee had to start over if he left to join another employer. This had the effect of forcing many employees to remain with their sponsoring employers for many years and the resulting employment stability helped to justify the expense of the process.

These extensive delays eventually will be a thing of the past under PERM. Once the DOL irons the kinks out of the process, employers can expect labor certification decisions in approximately six months after the process begins. Unless there are quota regressions, therefore, this means that employees will be able to file their applications for permanent residence (Form I-485) shortly thereafter. Due to recent changes announced by the USCIS, these employees may become “portable” and change to a new employer immediately if they will work in the same or a similar occupational category! This means that the employee can move to a competitor yet still secure permanent residence based on the labor certification or other filings made by the original sponsoring employer.

The relative speed of the permanent residence process resulting from PERM and these recent “portability” changes has caused employers to re-examine when they commence this process and what financial reimbursement they want to receive if the sponsored employee leaves within a specified period. There are a variety of approaches and they depend on a number of factors, including the employer’s needs and corporate

culture. At this point, we simply want to alert employers to develop consistent immigration policies to address this issue *before* sponsoring employees so that they have procedures in place to address the significant potential that these sponsored employees will leave the sponsoring employer sooner than expected.

VI. Recent Decisions in the Immigration Area

There have been three recent decisions in the immigration area with which employers should be familiar. On June 9, 2005, the United States Court of Appeals for the Eleventh Circuit issued its opinion in *Williams v. Mohawk Industries, Inc.*, No. 04-13740 (11th Cir. June 9, 2005). In *Williams*, the Eleventh Circuit upheld the legal sufficiency of a class action complaint filed by Mohawk employees under the federal and state RICO statutes that alleged that Mohawk had deliberately hired undocumented workers as part of a conspiracy to depress overall wages and reduce workers' compensation claims. On June 30, 2005, the DOL's Review Board found the Pegasus Consulting Group owed current and former H-1B employees more than $300,000 in back pay and civil penalties for failing to pay the wages required by the LCA's for these employees. *See United States Department of Labor v. Pegasus Consulting Group, Inc.,* ARB No.03-032.

Finally, in *EEOC v. Bice of Chicago*, No. 04-C-2708 (N.D. Ill. July 18, 2005), the court granted a motion by the Equal Employment Opportunity Commission ("EEOC") for a protective order barring any discovery into the immigration status of employees who had made sex and national origin discrimination claims that the EEOC was pressing. In commenting on the decision, the EEOC's regional counsel indicated that the agency will vigorously oppose discovery into the immigration status of claimants in discrimination cases because the agency considered the inquiry to be an effort to intimidate discrimination claimants by spreading the fear of arrest and deportation.

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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**.

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