April 5, 2005

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SPECIAL IMMIGRATION ALERT

On April 1, 2005, the U.S. Citizenship and Immigration Services ("USCIS") started accepting H-1B petitions against the 2005-06 quota for new H-1B employees who will start work on October 1, 2005. On March 8, 2005, the H-1B Reform Act of 2004 (the "H-1B Act") added 20,000 additional H-1B visas to the previously exhausted 2004-05 quota, reinstated the "H-1B Dependent Employer" requirements, and required employers to pay 100% of the prevailing wage identified for the foreign national's job classification. On March 28, 2005, the new Program Electronic Review Management ("PERM") labor certification regulations promulgated by the U.S. Labor Department ("DOL") became effective and replaced the existing labor certification procedures. On June 6, 2005, the more restrictive eligibility provisions in the L-1 Visa Reform Act (the "L-1 Act") will regulate the approval of all L-1 applications and place additional verification burdens on employers to verify the immigration status of contract labor when they are in a "joint employer" situation. On March 18, 2005, the government announced that Wal-Mart Stores, Inc. had agreed to pay an $11 million civil settlement to resolve charges that it had knowingly used cleaning contractors that employed undocumented workers. In this Special Immigration Alert, we shall address these and other recent developments in the immigration field.

1. The USCIS Accepting New H-1B Petitions for 2006 Quota

On April 1, 2005, the USCIS started accepting new H-1B petitions toward the fiscal 2006 H-1B quota that begins on October 1, 2005. As you know from our previous alerts, the fiscal 2005 H-1B quota was reached prior to its effective date on October 1, 2005, because the demand for new H-1B petitions vastly exceeded the limited 65,000 supply. We anticipate that the demand for new H-1B visas will be even greater this year. For this reason, **we strongly advise employers to immediately evaluate their workforce needs and, if they anticipate filing new H-1B petitions, to do so as soon as possible. This applies also to foreign students working as part of their F-1 practical training. While their employment authorization may not expire until summer 2006, these foreign students may not be able to transition to H-1B status then if the supply of H-1B visas under the fiscal 2006 quota already has been exhausted.**

2. The H-1B Reform Act

The H-1B Reform Act contains several provisions that relate to employers who rely on H-1B workers. It adds 20,000 new visas to the annual quota. It changes the rules on how much employers must pay to these workers and those applying for permanent residence. Finally, it reinstates the concept of an H-1B Dependent Employer that had lapsed in 1983.

A. 20,000 Additional New H-1B Visa Numbers

The H-1B Act provides an exemption from the annual H-1B cap for up to 20,000 foreign nationals. The statute appears to limit the availability of these visas to foreign nationals who have earned at least a master's degree from a U.S. university, but the USCIS has issued contradictory press releases about whether it will limit these new visas to just this group. These additional visas were to be available on March 8, 2005, but the USCIS has announced that it will reject any applications filed toward the previously exhausted 2005 quota because it has not had time to issue filing instructions.

We expect that the USCIS will announce filing instructions for these additional visas at any moment. H-1B petitions approved under this provision of the H-1B Reform Act will be able to obtain visas and/or start work as soon as the petitions are approved and will not have to await the fiscal 2006 H-1B quota that begins on October 1, 2005. Given the limited supply of these additional H-1B numbers, we anticipate that they will go quickly. For this reason, employers should be prepared to file qualified new H-1B petitions under the H-1B Reform Act as soon as the USCIS announces the filing instructions. Stay Tuned!

B. New Prevailing Wage Rules

The H-1B Reform Act also requires employers filing H-1B petitions or labor certification applications to pay at least 100% of the prevailing wage for the foreign national's job classification. Under prior law, the employer could satisfy these requirements by paying at least 95% of the prevailing wage. Under the H-1B Reform Act, however, the employer must pay 100% of the prevailing wage for the position.

The new prevailing wage requirements in the H-1B Reform Act have been coupled with new rules governing how the Department of Labor ("DOL") must compile the wage surveys that support these prevailing wage requirements. In the past, many employers have been hampered by the DOL wage surveys because they only considered two wage levels: entry and experienced. To assist employers in this regard, Congress mandated in the H-1B Act that the DOL make available a governmental survey of prevailing wages that addressed at least four wage levels based on experience, education and level of supervision. The legislation also provides a formula for calculating two additional levels to supplement a two-level wage survey that should prove useful to employers seeking to file either H-1B petitions or labor certification applications.

C. H-1B Dependent Employers

The H-1B Reform Act also resurrects the concept of the "H-1B Dependent Employer that had expired in October 2003. H-1B Dependent Employers basically are those employers who have 15% or more H-1B employees as a percentage of their total workforce. In creating (and now reinstituting) the concept of the

H-1B Dependent Employer, Congress expressed its concern that these employers take steps to reduce the number of H-1B employees they have and simultaneously increase the number of U.S. workers on their payroll.

As a result of the H-1B Reform Act, H-1B Dependent Employers filing new H-1B visa petitions now first must attest that: (i) they have recruited and been unable to locate a qualified U.S. worker for the position; (ii) hiring the proposed H-1B worker will not displace a qualified U.S. worker on their payroll within the 90-day period preceding and following the submission of the H-1B petition (Direct Displacement); and (iii) placing the proposed H-1B worker with a third-party where that third-party has the "indicia" of employment responsibility for this worker will not displace a qualified U.S. worker from the third-party's payroll within the 90-day period preceding and following the submission of the H-1B petition (Secondary Displacement). H-1B Dependent Employers now must make sure that placement of their H-1B workers will not cause Secondary Displacement, and third-party employers using these workers also must do the same.

3. New PERM Regulations

The new PERM regulations took effect on March 28, 2005. These regulations create an electronic filing and attestation and audit process that will replace the current traditional and reduction-in-recruitment ("RIR") procedures. While PERM promises a much faster adjudication, it also narrows the eligibility criteria and expands the current RIR recruiting requirements. Also, since the process is new, there is no track record that can be used to determine critical issues such as adjudication standards, DOL interpretations of business necessity issues, and the length and frequency of possible audits.

4. L-1 Visa Reform Act of 2004

By passing the L-1 Act, Congress sought to address perceived outsourcing abuses in two respects. First, it 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. Second, it 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. These provisions are scheduled to take affect on June 6, 2005. 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.

5. Wal-Mart Settles Immigration Charges

On March 18, 2005, the government announced that Wal-Mart Stores, Inc. ("Wal-Mart") had agreed to pay an $11 million in settlement arising out of charges that it knowingly used independent contractors for cleaning services that employed undocumented workers from 1998 through 2003. In addition, several of the contractors pleaded guilty to criminal charges for their involvement in the illegal employment of undocumented workers.

As part of the settlement, Wal-Mart also will have to establish as part of its compliance program a means to verify that independent contractors are taking reasonable steps to comply with the immigration laws in their employment practices and a training program for store managers regarding their legal obligations to prevent knowingly hiring, recruiting and/or continuing to employ undocumented workers in a manner consistent with pertinent anti-discrimination laws.

The Wal-Mart settlement reminds employers that they cannot ignore their legal obligations to ensure compliance with the immigration laws just because the work is done by independent contractors.

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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 may also contact; **Elise A. Healy**, the immigration member of the firm in our **Dallas** office, at **214/397-4345,** or **ehealy@ebglaw.com;** or **William M. Poole,** the immigration member of the firm in our **Atlanta** office, at **404/923-9035,** or **wpoole@ebglaw.com.**