May 2007

IMMIGRATION ALERT:

US DOL Publishes Final Rule Eliminating Substitution of Employees in Permanent Labor Certification Program

On May 17, 2007, the U.S. Department of Labor ("DOL") published a new Final Rule addressed at eliminating fraud and maintaining the security and integrity of the permanent labor certification program. As our readers understand, employers who want to sponsor foreign national employees for permanent residence must first secure labor certification from the DOL for most of these employees. By issuing an approved labor certification, the DOL is certifying that there are no qualified U.S. workers in the job location who can fill the sponsored position. Labor certification is a protection for U.S. workers to make sure that foreign nationals do not take their jobs.

According to the DOL, there has been a high incidence of fraud in the permanent labor certification program. One of the chief concerns of the DOL is what it calls the common practice of selling or bartering approved labor certifications to foreign nationals who have no intention of occupying, and are not qualified to fill, the sponsored position. To eliminate this practice, the Final Rule specifically bars the sale, barter or purchase of permanent labor applications and certifications. It also defines the procedures for DOL debarment of any

employer found to be acting fraudulently.

To curtail what the DOL sees as the pernicious nature of the practice of "substitution," the new Final Rule also prohibits employers from substituting different employees in pending or approved labor certifications. Due to the length of the permanent residence process, employers found that they still had a need to fill the certified position but that the foreign national originally selected for the job was no longer available for the job. Employers then could "substitute" a different foreign national into the certified position and, without losing the original place in line, use the existing approval to support the new employee's permanent residence efforts. Once it takes effect on July 16, 2007, the new Final Rule prohibits the substitution of alien beneficiaries in approved permanent labor certifications as well as those awaiting review in the DOL Backlog Elimination Centers.

The new Final Rule also prohibits employers from recouping foreign workers' costs, including legal fees and recruiting expenses, related to preparing, submitting and obtaining a permanent labor certification. The DOL believes that the process of sponsoring a foreign national is in the employer's interest, not the employee's, and thus the employer should bear the entire expense of the process. As a result, the DOL feels that requiring the employer to pay all expenses associated with the PERM process will prevent fraud by limiting applications to just those filed by employers with a strong interest in retaining an important and necessary employee. To prevent circumvention of this prohibition, the new Final Rule prevents employers from seeking reimbursement of these expenses through payroll deductions or any other means, such as lump sum payments.

Finally, as an additional effort to prevent fraud, the new Final Rule imposes a 180-day limit on the validity period for all approved labor certifications after July 16, 2007, the effective date of the rule. This applies to both PERM approvals as well as those obtained under the traditional and "RIR" labor certification procedures that predated PERM. It means that employers will have 180 calendar days to file an I-140 Immigrant Petition for Alien Worker that is based on an approved permanent labor certification. If the I-140 petition is not filed within this time, the approved labor certification will become void.

This new Final Rule requires employers to review their roster of approved and pending labor certification applications promptly to determine several factors. First, are there any approved or pending applications that might support substitution? Second, are there any PERM applications in process that are being paid for by the sponsored employee and will not be filed by July 16, 2007? Finally, are there any approved applications for which no I-140 petition has been filed. The new Final Rule threatens to adversely impact cases in these and possibly other areas unless employers review each case against the specific requirements of the rule.

USCIS Stops Premium Processing on I-140s that seek

On May 17, 2007, the USCIS announced that it would cease its Premium Processing service on May 18, 2007 for I-140 Immigrant Petitions for Alien Workers that request labor certification substitution. The rational for the discontinuance of this service is that the USCIS anticipates a

considerable increase in the number of petitioning employers that will submit I-140 petitions requesting Premium Processing Service and seeking labor certification substitution before July 16, 2007, the effective date of the new Final Rule. The USCIS believes that the volume of these petitions will exceed its capacity to provide the 15 calendar day Premium Processing Service mandated by program guidelines. For this reason, it is discontinuing the service temporarily.

USCIS Expands Filing Period for O/P Petitions

On April 16, 2007, the USCIS issued a new Final Rule to permit petitioning employers and other organizations to file O and P nonimmigrant petitions up to one year in advance of the scheduled event, competition or performance. O petitions are filed on behalf of foreign nationals who have extraordinary ability in the arts, sciences, education, business or athletics. P petitions are for foreign nationals who are coming temporarily to the United States to perform as an artist or entertainer under a reciprocal exchange program or for foreign artists or entertainers who seek to come here to perform, teach or coach under a commercial or noncommercial program that is culturally unique.

Under prior USCIS rules, O and P petitions, like all other nonimmigrant petitions, could not be filed more than six months prior to the schedule event. Employers, agents, promoters and others complained that events using O and P nonimmigrants often had to be scheduled more than a year in advance and that this six month limitation on filing imposed a significant hardship on scheduling and promoting these performances. The USCIS agreed and issued this new Final Rule allowing O and P petitions to be filed up to one year in advance of the scheduled event.

USCIS Announces that the H-1B Cap is Reached

Our prior alerts have advised our clients and friends that the cap on standard H-1B petitions was reached on April 2, 2007, the first day that standard H-1B petitions for fiscal 2008 could be filed. Under the U.S. immigration laws, an additional 20,000 H-1B visas are set aside for foreign nationals with master's degrees from American universities. The H-1B master's cap was reached on April 30, 2007.

The USCIS has announced that it received too many applications on the last day for each category of H-1B submission. As a result, it conducted a "lottery" to determine which cases would be selected. The lottery for the standard cases was conducted on April 12, 2007. The lottery for master's cases was held on May 1, 2007. Receipt notices in these categories that were sent out prior to the date of the respective lotteries do not indicate that a case was selected. The USCIS continues to sort through the cases to determine which ones can be adjudicated.

Those employers with cases that did not make the H-1B quota this year may want to consider the J-1, O, TN, E-3 or possibly other nonimmigrant visa classifications that might apply to the specific circumstances of the case.

The Senate Considers Comprehensive Immigration Reform

On May 22, 2007, the Senate opened debate on Comprehensive Immigration Reform ("CIR").

The focus was S. 1348, a "compromise" struck between the Senate leadership and the White House on the key components of this complex and politically explosive issue. At the present time, S.1348 is going through the legislative process in which numerous amendments will be offered by both parties in an effort to narrow or even upset the "compromise." Even if S. 1348 passes, the CIR legislation still must pass the House where it faces an even more uncertain future. As a result, the prospect of CIR is problematic and, even if it is passed by Congress, will not become a reality for months.

Because this legislative process occurs during a presidential election cycle, we anticipate that CIR will significantly change over time as legislators propose amendments to the present S. 1348 provisions. Notwithstanding the current uncertainty, the CIR proposal breaks down into several broad areas that are the focus of the legislative process:

1. **Border Enforcement:**

Title I of S. 1348 address the area of border enforcement. It seeks to add personnel, technology and additional resources to prevent illegal aliens from crossing the country's borders. It also would set up a biometric exit-entry system to capture data and other information from foreign nationals entering and departing the United States, and would increase the country's detention capacity.

2. **Interior Enforcement:**

Title II of S. 1348 deals with interior enforcement. It proposes to add new prosecutors, judges and other law enforcement personnel that will deal primarily with immigration violations. It also would permit more detention of illegal aliens, strengthen the provisions for the deportation of criminals, increase the criminal penalties for those who violate the laws relating to immigration, and further limit access to the courts for those involved in deportation proceedings. Finally, it provides federal funding for state and local law enforcement authorities so they can help enforce the federal immigration laws.

3. **Employment Verification System:**

Title III of S. 1348 would establish an Electronic Eligibility Verification System ("EEVS") that would require employers to verify work authorization of employees from a central database operated by the Department of Homeland Security ("DHS"). Employers would be trained on the EEVS and then be given 18 months to verify new hires and an additional 18 months to re-verify all employees. To protect employees, the legislation sets up a review process within DHS that would allow employees to claim that the EEVS erred. This Title also authorizes the DHS and the Social Security Administration ("SSA") to establish regulatory requirements for employers who receive "No-Match" letters, and removes the current statutory provisions that bar SSA from cooperating with or providing tax-related information to DHS.

4. **Temporary Worker ("Y") Visa Classification:**

Title IV of S. 1348 creates a new "Y" nonimmigrant visa classification that is designed to

replace the current H-2A and H-2B programs. According to the proposed statute, this new visa classification cannot become effective until the DHS certifies that certain border security and enforcement measures mandated by Titles I-III have been implemented.

If enacted as proposed, a Y nonimmigrant would be entitled to work for any employer who could demonstrate that it: (a) could not locate any qualified U.S. worker for the job; (b) would pay the prevailing wage for the position; (c) would provide the same working conditions as it gives to U.S. workers; and (d) would comply with all U.S. labor laws. Y workers would be allowed to work for up to six years in two year increments but would have to leave the country for at least one year in between each two year work segment. Originally, S. 1348 proposed up to 400,000 Y visas annually but recent amendments have reduced this allotment to 200,000.

5. **Nonimmigrant Visa Reform:**

Subtitle C of Title IV addresses specific issues in nonimmigrant visa reform. The first area is the "F" nonimmigrant visa for academic students. This would extend the period of post-curricular practical training from 12 to 24 months and create a new "F-4" student visa that would assist those pursuing advanced degrees in the fields of math, engineering, technology or the physical sciences.

Subtitle C also would implement changes to the current H-1B nonimmigrant classification. It would limit the definition of a "Specialty Occupation" to exclude aliens who qualify based on experience. It would expand the H-1B quota to 115,000 for fiscal 2008 (which begins on October 1, 2007) and allow the DHS to increase that number to 180,000 depending on the volume of H-1B applications received. Before filing an H-1B petition under this provision, employers would have to demonstrate that it had recruited unsuccessfully to find a qualified U.S. worker and that the H-1B worker would not displace a U.S. worker. The six year limit on H-1B workers could be extended for "merit-based" adjustment applicants but the present one and three year protections for H-1B workers in AC21 would be eliminated.

Finally, this legislation would impose substantial limitations on the approval of L-1 intracompany transfer visas for those seeking to set up new businesses in the United States.

6. **The Conrad Program:**

S. 1348 would make the Conrad 30 Program permanent, and would allow certain underserved states that use up all 30 waiver slots to get an additional 20 slots if certain highly underserved rural states (that have substantial difficulty recruiting Conrad doctors) receive a guaranteed minimum number of doctors under the program.

7. **Green Card Reform:**

S. 1348 would substantially restructure the pattern of immigration to this country. It would raise the quotas on both family- and employment-based immigration to clear up the present backlogs. Once this is achieved, however, it would sharply reduce the quotas for family-based immigration and eliminate many of the family-based immigration categories. It also would replace the

current employment-based preference scheme with a merit-based point system that would prioritize immigration based on factors such as the occupation of the applicant, the type of employment s/he has had, the educational level, and the need for the applicant's skill as defined by the DOL. The present Diversity Lottery Program would be eliminated. Overall, however, S. 1348 would reduce the total number of immigrants once the quota backlogs were eliminated.

8. **Legalization:**

S. 1348 would create a legalization program that allows undocumented workers to gain lawful status. It establishes a "Z" nonimmigrant visa category for those currently here illegally, and provides them with a mechanism for securing permanent residence once the existing quota backlogs for permanent residence are eliminated.

As soon as CIR is enacted, it would allow illegal aliens to apply for Z visa status if they: (a) have resided here continuously since January 1, 2007; (b) are admissible to the United States; and (c) are working or have met specific work requirements in agriculture. Spouses, children and elderly parents would be able to obtain derivative Z visas if they also had been here continuously since January 1, 2007, and the children were under 18 when they apply. Individuals who are inadmissible due to prior immigration or criminal violations, who cannot establish good moral character, or who entered or attempted to enter the United States illegally on or after January 1, 2007 are not eligible for the Z visa.

Applicants for Z visas would be required to pay processing costs (up to $1,500 per application), a penalty of $1,000 (principal only), a state impact fee of $500 and a $500 penalty fee for each derivative. Z status would be granted for four years initially, and would accord applicants work authorization. Z status could be extended indefinitely if certain conditions are met. One of these conditions would require the principal Z applicant and all dependents (over age 16) to remain gainfully employed.

Z nonimmigrants would be eligible to apply for permanent residence if they file the application at the U.S. consulate in their country of origin (the "touchback requirement"). The application period would begin as soon as the current backlog in permanent residence applications is eliminated. Applicants would have to undergo a health examination and pay a $4,000 penalty. This would be in addition to the fees required for the Z status.

9. **Permanent Residence for Long-Term Child Residents:**

Finally, S. 1348 would provide children brought to the United States while under 16 with a mechanism to obtain permanent residence if they: (a) have maintained a continuous residence here since January 1, 2007; (b) are under 30 when they apply; (c) have a high school education (or the equivalent); and (d) have not been absent from the United States for more than 365 days.

The prospects for CIR are uncertain. The situation is extremely fluid and many of the provisions outlined here are likely to change, some significantly, during the course of the legislative process. For this reason, we shall defer any detailed analysis until the framework for

immigration reforms appears more certain.

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If you have questions about these issues or any other developments in the immigration area, contact:

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