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IMMIGRATION SOLUTIONS

This is a publication of Landis & Arn, P.A., a law firm located in Portland, Maine devoted exclusively to the practice of immigration and naturalization law.

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Inside this issue:

Annual H-1B Cap Requires Advance Planning and Ability to Think Outside the Box

by Peter J. Landis, Esq.

Today, as fewer U.S. students are going into math, engineering and the hard sciences, U.S. employers increasingly look to foreign nationals to fill many types of highly skilled positions. In fact, more than half of the researchers in U.S. science laboratories are foreign-born. However, U.S. employers have few means at their disposal for employing highly educated foreign workers. The H-1B category is the principal non-immigrant visa category available to U.S. employers to bring professionals to the U.S to work on a temporary basis. To be eligible for H-1B status, a foreign national must be coming to the U.S. to fill a position which requires at least a bachelor's degree in a particular field, or a combination of education, training and experience that is equivalent to such a degree. Although the H-1B program has built-in safeguards to ensure that wages and working conditions of U.S. workers are not adversely affected, there is **no** requirement for a petitioning employer to document the unavailability of qualified U.S. workers. H-1B status can be obtained initially for a period of up to three years and can be extended for a maximum period of stay of six years in the H-1B classification. If available, the H-1B category is an effective tool for U.S. businesses to obtain cutting edge technical skills or expertise that is relatively unique or not readily available, to relieve temporary labor shortages of workers with specific skills and to employ individuals with special expertise in overseas needs, markets or trends that enable U.S. companies to compete globally.

Annual Cap on H-1B Numbers

There is a limit of 65,000 new H-1B petitions that can be approved in any fiscal year beginning October 1st.* Unfortunately, in recent years, H-1B numbers have run out at record-breaking speed. As H-1B petitions can be filed up to six months in advance of the start date of the proposed H-1B employment, petitions can be filed with U.S. Citizenship and Immigration Services (USCIS) beginning April 1st, requesting an October 1st start date.

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Did you know?

Foreign students represent half of all U.S. graduate enrollments in engineering, math, and computer science. There still are not enough U.S. students graduating with advanced degrees in these fields to fill highly specialized positions, and, according to the Bureau of Labor Statistics (BLS), the demand for such graduates will increase substantially in the next ten years.

I-9 Compliance Update:

Trends and Issues Regarding Unauthorized Employment of Foreign Nationals and Homeland Security Enforcement

by Marcus B. Jaynes, Esq.

Introduction

In an increasingly global economy, the employment of foreign workers in the United States has never been more important, to keep U.S. businesses competitive and maintain the U.S.'s preeminence in a variety of scientific and technical fields. Likewise, the employment of foreign nationals who lack employment authorization—or who provide fraudulent documentation—is also at a historical peak. With the Department of Homeland Security (DHS) and other federal government agencies stepping up efforts to enforce the ban on employment of unauthorized foreign nationals, it is critical that employers understand their duties and obligations and the steps required to protect themselves or to take action in the event of complications.

Unauthorized Employment and Penalties

a. What is Unauthorized Employment? - *The Immigration and Nationality Act (INA)* prohibits employers from knowingly hiring an individual not authorized to work or continuing to employ a worker whose employment authorization has expired. Specifically, the pertinent part of section 274A (a) of the INA states:

It is unlawful for a person or other entity ----

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien….with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the

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Obtaining Lawful Resident Status in the U.S. through Family

by Cynthia C. Arn, Esq.

Despite the fact that immigration has been one of the hottest social and political topics of the past few years, most people have very little idea what is involved in legally bringing a foreign-national family member to the United States to live as a legal resident. In fact, bringing family members here from abroad is a multi-step process which can take anywhere from a few months to many years to accomplish. With few exceptions, those individuals must then remain in the U.S. for several years as legal residents before they can apply for U.S. citizenship. U.S. citizenship must then be earned through a testing process, security clearances, and a demonstrated willingness to serve the U.S. in some capacity (whether military or otherwise) when required by law.

How long the process will take, and even whether obtaining lawful permanent resident ("LPR") status is possible, depends on several factors. Only individuals who are U.S. citizens or LPRs themselves can initiate the process of bringing a relative here to live. The U.S. citizen or LPR must initiate the process; absent certain very specific circumstances, the foreign national relative cannot initiate the process himself. The person who initiates the process is called the "petitioner"; the foreign national relative seeking to come to the U.S. is the "beneficiary."

Accordingly, the first question is whether the petitioner is a U.S. citizen or LPR. The second question is the nature of the relationship between the petitioner and the beneficiary. A U.S. citizen can petition for the following foreign national relatives:

- Spouse
- Minor child (under age 21)
- Unmarried adult child (21 or older)
- Married adult child (21 or older)
- Parents
- Siblings (either minor or adult)

An LPR can petition for the following foreign national relatives:

- Spouse
- Minor child (under age 21)
- Unmarried adult child (21 or older)

Note that an LPR cannot file for parents, married adult children or siblings. Note also that there is no petition process available for grandparents, aunts, uncles, cousins, etc. The ability of adopted children to immigrate through their U.S. citizen adoptive parents is strictly regulated. The policy rationale behind family-based immigration is family reunification. However, the concept of family, and who should be included in the reunification scheme, is quite limited.

Moreover, not all of the above categories are created equal. The waiting time for the beneficiary to begin the visa application process varies dramatically depending on what visa category he fits in. The best visa category is called "immediate relative." Like many terms used in immigration law, this phrase is a term of art. It means, specifically, spouses, minor children and parents of U.S. citizens. Everyone else listed above is assigned to one of several "preference" categories for visa allocation purposes.

The major difference between the "immediate relative" and the "preference" categories is that immediate relatives are not subject to any numeric cap; once the petitions filed on their behalf by their U.S. citizen relatives are approved, they can immediately begin the process of applying for their visa. In contrast, preference categories are subject to annual numeric limitations. For example, the "family 4th preference" category (brothers and sisters of U.S. citizens) is limited to 65,000 visas worldwide annually. Since demand in that category far exceeds supply, there is an extended wait for visas in that category. A review of the Department of State Visa Bulletin for December 2007 shows that visas are now being issued for siblings of U.S. citizens who had petitions filed on their behalf in **June of 1997**. For nationals of four countries with very high demand (China, India, Mexico and the Philippines) the wait is even longer. For the Philippines, visas are being issued in the family 4th preference category based on petitions filed in **November of 1985**. The date that the petition is filed on behalf of the beneficiary is called the "priority date." When the Visa Bulletin indicates that the Department of State has reached the date on which the petition was filed, we say that the "priority date is current."

Once the petition is approved, and the priority date is current, the foreign national will need to apply for his visa. Pre-processing of most immigrant visa applications is done through the National Visa Center in Portsmouth, New Hampshire. The interview on that visa application is conducted at a U.S. Consulate in the beneficiary's home country. To apply for the visa, the beneficiary must provide documentation establishing the family connection between himself and the petitioner, a birth certificate, police clearances from every place of residence of more than 6 months since turning 16 years of age, evidence of financial support, medical clearances and, of course, a valid passport. The Immigration and Nationality Act (Title 8 of the U.S. Code) sets out an extensive list of criteria (including criminal convictions or activity, certain health conditions, insufficient

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Notice for Travelers

- Beginning in January 2007, all U.S. citizens were required to present a passport when entering the United States by air.
- As of January 31, 2008, all adult travelers (ages 19 and older) will be required to present proof of citizenship, such as a birth certificate, and proof of identity, such as a driver's license, when entering the United States through land and sea ports of entry.
- The current official turnaround time for obtaining a passport is four to six weeks.

Useful Links

- U.S. Citizenship and Immigration Services: *www.uscis.gov*
- LPR Info: *www.uscis.gov/greencard*
- Citizenship Info: *www.uscis.gov/citizenship*
- U.S. Department of Labor: *www.dol.gov*
- Visa Bulletin (for priority dates & preference info): *travel.state.gov/visa/frvi/bulletin/bulletin_1360.html*

Family (Continued from page 2)

financial support, and previous immigration violations, among many others) which can render the beneficiary "inadmissible" to the United States (i.e. the visa application can be denied.) There is no appeal for denial of a visa application, although it is sometimes possible to obtain a review of the decision by the U.S. Consul.

Approval of the visa application is not a grant of LPR status. A visa simply allows the beneficiary to board a plane and appear at a U.S. port of entry for inspection and admission to the U.S. The Consulate will provide the beneficiary with a packet of documentation which is presented at the U.S. port of entry. Admission by the Department of Homeland Security at the U.S. border is what effectively grants the beneficiary LPR status. A notation is made in the passport, and within a few weeks, he will receive a permanent resident card in the mail.

As a practical matter, if the beneficiary's visa application is approved, he will most likely be admitted to the U.S. as an LPR, provided there has been no material change in his circumstances or eligibility for a visa in the category in which he applied, and that nothing comes to light that would have resulted in a visa denial had it been known. For example, if the beneficiary applied for and was issued a visa as the unmarried adult child of a U.S. citizen (family 1st preference), but between the time of visa issuance and entry to the U.S. the beneficiary marries, the beneficiary is no longer entitled to entry into the U.S. in the family 1st preference category. The visa can be revoked, entry to the U.S. denied and, if it comes to light after the beneficiary has already entered the U.S., his LPR status can be rescinded.

Of course, given the length of time that beneficiaries may be waiting to make their visa applications, some change in their life circumstances may occur. It is important to bear in mind, and for visa applicants to understand, that such changes will very likely impact visa availability. In the circumstance above, if the beneficiary marries, he will need to change to a different visa category. Specifically, the change would be from family 1st preference (unmarried adult child of U.S. citizen) to family 4th preference (married adult child of U.S. citizen.) The result would be a significantly longer wait time for the visa (about 5 years longer right now), but when the priority date becomes current he can bring his spouse and children.

The purpose of this article is to provide some very basic information on the process of bringing foreign national family members to the U.S. to reside lawfully. Each individual case is different, and can range from the fairly straightforward to the mind-bendingly complex. At a time when everyone talks about immigration, it helps to know a little bit about what is involved.

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H-1B (Continued from page 1)

However, this past year, over 130,000 petitions had been received by USCIS by April 2nd for the 65,000 H-1B visa numbers that were to become available on October 1, 2007. USCIS stopped accepting any petitions received after that date and devised a random selection process for selecting a sufficient number of petitions to fill the annual H-1B cap for the new fiscal year. Those employers not selected in the lottery, and those employers who did not manage to file petitions before USCIS closed the process, had to look for other options or wait until October 1, 2008 when new H-1B numbers would become available again. Therefore, in the absence of any congressional action increasing H-1B numbers for the upcoming fiscal year, it is unlikely that the odds of obtaining a new H-1B number for October 2008 will improve. In fact, they will probably be worse. This requires employers to plan ahead in preparing H-1B petitions for prospective H-1B workers and to look very carefully at ways to avoid the H-1B cap, or to find alternative visa categories.

Certain employers and individuals are not subject to the annual H-1B cap. Persons previously granted H-1B status, and already counted toward the cap, are not subject to the cap. Thus H-1B extension petitions, petitions requesting a change of H-1B employers (provided the foreign national was not previously exempted from the cap) and petitions requesting concurrent H-1B employment may not be subject to the cap. Foreign nationals coming to work for institutions of higher education or not-for-profit or governmental research organizations are exempt from the cap. Physicians who previously held J-1 status and received a waiver of their two-year home residence requirement are also not subject to the cap. Finally, each fiscal year 20,000 foreign nationals who have received a master's degree or higher from a U.S. college or university are also exempted from the cap.

Alternatives to the H-1B Classification

Other visa options will need to be explored to hire foreign nationals who are capped out or not otherwise exempt from the cap. Possible nonimmigrant options might include:

- TN status for citizens of Canada and Mexico who are coming to the U.S. to perform specifically designated occupations listed in Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (NAFTA);
- O-1 status for persons who have extraordinary ability in the sciences, arts, education, business, or athletics, or extraordinary achievements in the motion picture and television field;
- L-1 Intra-Company Transferee status for foreign nationals who, within the three preceding years, have been employed abroad continuously for one year in a managerial, executive, or specialized knowledge capacity and are coming to the U.S. to be employed by a branch, parent, affiliate, or subsidiary of that same employer in a managerial, executive, or specialized knowledge capacity;
- E-1/E-2 status for foreign nationals of a treaty country coming to the U.S. to either engage in substantial international trade primarily between the U.S. and the country of the applicant's nationality, or to direct or develop a substantial investment in a

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H-1B *(Continued from page 3)*

real, operating enterprise which must not be marginal (or if the person is not the principle investor, he or she must be employed as a supervisor, executive or person of highly specialized skills);

- E-3 status for citizens of Australia who are coming to the U.S. to fill professional positions which require a bachelor's degree or equivalent. Same as H-1B;
- F-1 status, for foreign students who are in the U.S. pursuing a full course of study, may be the basis for eligibility for employment authorization. The most common situation involves optional practical training which enables F-1 students to obtain up to 12 months of employment authorization to perform work that is related to their field of study;
- J-1 Exchange Visitor status for foreign nationals coming to participate in an approved internship or training program. Also exchange visitors who have been in the U.S. as students are entitled to a period of academic training following the completion of their academic program which may authorize them to work for periods ranging from 18 to 36 months.

Conclusion

Until Congress passes remedial legislation increasing the annual H-1B numbers, it is critical for U.S. employers to consult with experienced immigration counsel to ensure that the H-1B cap does not hinder their ability to employ critical professional foreign workers. Moreover, for those foreign workers who are in valid H-1B status, or are maintaining other valid nonimmigrant status which allows them to work in the U.S., employers need to develop long-term strategies for obtaining lawful permanent resident status so that they may continue to employ these critical workers.

* Each fiscal year 6,800 H-1B numbers out of the total 65,000 are set aside for nationals of Singapore and Chile as part of the Free Trade agreements between the U.S. and these countries. These numbers are largely unused and any unused H-1B numbers for nationals of Singapore and Chile fall back into the overall pool. Therefore, if you have a foreign national from Singapore or Chile there is likely to be an available H-1B number.

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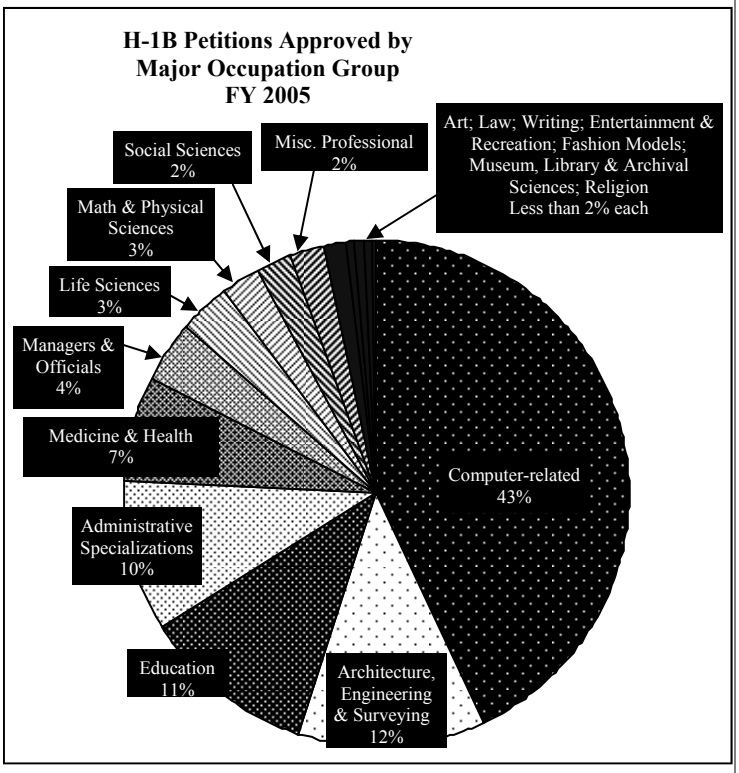
Take Action

On April 2, 2007 USCIS received a volume of H-1B petitions well in excess of the 65,000 annual limit, thereby creating an unprecedented 18-month restriction on access to new H-1B visas for temporary professional employees. This has caused great hardship for many U.S. businesses and poses a significant obstacle not only to keeping the U.S. economy competitive in the world market, but to keeping jobs in America. Letters to members of Congress urging them to take action in increasing H-1B numbers are extremely important. If you, or your business, might be interested in writing a letter or helping to resolve the lack of availability of H-1B numbers, please contact Peter Landis.

Did you know?

According to a recent study by the Ewing Marion Kaufman Foundation, in 2006, individuals with foreign citizenship working in the U.S. were named as inventors or co-inventors on 25% of the international patents filed from the United States. According to an earlier Kaufman Foundation study, immigrants founded 25% of technology companies established in the previous decade in the United States and these immigrant-founded companies employ 450,000 workers.



No-Match (Continued from page 1)

requirements of [the I-9 employment verification process].

It is also unlawful for a person or other entity, after hiring a person for employment, to continue to employ the person in the United States knowing the person is (or has become) unauthorized with respect to such employment.

Therefore, the law prohibits any form of unauthorized employment – whether it is known at the time of hiring or during the employment. The law forbids the "knowing" employment of unauthorized employees but it includes not only "actual knowledge" but also "constructive knowledge" (which means essentially that the employer should have known). The law also forbids failure to properly verify the employment authorization of new employees.

b. Penalties for Unauthorized Employment – The penalties for unauthorized employment are substantial. They include the following:

i. Order to Cease and Desist: The government can order that a company stop any further unauthorized employment;

ii. Civil Penalties: An employer can be ordered to pay fines ranging from $275 to $2,200 per unauthorized individual for the first violation, $2,200 to $5,500 per unauthorized individual for the second violation and $3,300 to $11,000 per unauthorized worker for employers with more than two violations;

iii. Criminal Penalties: The government can also impose criminal penalties of up to $3,000 per unauthorized individual and/or up to 6 months in prison upon a finding that there is a "pattern or practice" of unauthorized employment; the government can order an employer to serve up to 5 years in prison upon a finding of actual knowledge of unauthorized employment of at least 10 employees in a 12-month period;

iv. Civil Penalties for I-9 Violations: An employer can be fined $110 to $1,100 per person for failing to properly complete the I-9, Employment Verification Form;

v. Asset Forfeiture: The government can seize any assets that an employer used in connection with the unauthorized employment as well as gross proceeds from the services of the unauthorized employee.

Social Security Administration No-Match Letters

a. What is a no-match letter? No-Match Letters are an attempt by the Social Security Administration (SSA) to update its records and allocate millions of withheld dollars for which there exist no matching social security accounts. The SSA is not an enforcement unit and individuals and employers who receive No-Match Letters should not panic or immediately assume they are the focus of enforcement actions.

b. What is all the fuss about? DHS created safe harbor provisions and sought to provide them to employers in guidance letters accompanying No-Match Letters. DHS provided that if an employer followed its safe harbor rules upon receipt of a No-Match Letter, DHS would not be able to use the no-match letter as evidence that the employer knowingly hired unauthorized workers. The procedures involved records verification by employer and employee, with the provision that if no resolution occurred within 90 days, the employer would have the option to terminate the employee or take the risk of DHS using the no-match letter as evidence of the employer's knowing employment of unauthorized workers. The ACLU, with the support and cooperation of labor and other organizations, filed a lawsuit alleging that the implementation of the DHS regulations would result in the wrongful termination of millions of workers actually authorized to be employed.

c. What does the October 2007 preliminary injunction mean? The federal judge presiding over the lawsuit found that letting the rule go into effect would result in "irreparable harm to innocent workers and employers" and issued a preliminary injunction. This means that DHS cannot proceed with the issuance of its safe-harbor guidance letters until the Courts have decided the challenge to their lawfulness.

New I-9 Form in Effect

On November 7, 2007, USCIS announced the availability of a newly revised Form I-9, dated June 5, 2007. According to a November 26, 2007 announcement in the Federal Register, all employers are required to use the new (June 5, 2007) version of the form as of December 26, 2007. The American Immigration Lawyers' Association has learned that instead of publishing a new regulation now to more thoroughly revamp the I-9 Form, USCIS has issued the new I-9 based on the 1997/98 federal regulations, but will publish a new regulation, with a new I-9 form, in 2008.

Conclusion

The U.S. Government is stepping up its efforts to ensure both that foreign nationals who work without authorization are apprehended and prosecuted, and that U.S. employers are maintaining proper employee documentation/records and complying with requirements to verify employment authorization before hiring foreign workers.

As stated on the Worksite Enforcement website of the U.S. Immigration and Customs Enforcement (ICE) office, "ICE agents use many tools to conduct these worksite enforcement investigations, among them ICE's Forensic Documents Laboratory, which determines the authenticity of documents used to establish employment eligibility. ICE also works with the private sector to educate employers about their responsibilities to hire only authorized workers and how to accurately verify employment eligibility."

In this climate of increasingly strict enforcement of immigration-related employment regulations, it is important that employers and their employees understand their duties, obligations, and rights. The attorneys at Landis & Arn are available to assist with all aspects of this process.

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Located in Portland, Maine, the law firm of Landis & Arn, P.A. is devoted exclusively to the practice of immigration and naturalization law, providing advice and representation since 1980 in matters involving employment-based and business-related immigration, as well as family-based immigration, naturalization, asylum and deportation defense. The lawyers of Landis & Arn, P.A. have established a track record of success, assisting clients from throughout the world with a wide range of immigration matters. Please call (207) 775-6371 or e-mail info@landisarn.com to set up a consultation appointment so that we can put our expertise and experience to work for you.