PROSKAUER ROSE LLP®

Immigration and Nationality

Law Update

A report for clients and friends of the Firm

June – July 2007

We present here our special "summer issue" of the Proskauer Rose Immigration and Nationality Law Update. It's hard to believe that we're more than halfway through 2007, although what a tumultuous year it's been in immigration! We entered the year bracing ourselves and our clients for a vigorous H-1B filing season, and have not stopped to rest since then. This year has brought a forceful public and political debate on immigration – both legal and illegal – and the role of immigrants in our country today. At the same time, we have witnessed a push by state and local governments into this preserve of the federal government. Federal agencies acted to provide the relief to legal immigrants that has so far eluded Congress by announcing that green cards were available to legal immigrants waiting to begin the final step of the green card process, only to rescind the announcement at the last minute. Two weeks later, the government reversed itself again. We look forward to seeing what the next half of 2007 has to offer!

The Employment-Based Immigration Fiasco

In the middle of June, the Department of State (DOS) issued its July 2007 Visa Bulletin, announcing that all of the employment-based categories would be open for the month of July. That Bulletin cleared the way for nearly every individual sponsored by an employer, and his immediate family members, to submit the final applications for a green card between July 1st and July 31st.

As background, employment-based immigrant visas are numerically limited to 140,000 each fiscal year, allocated on the basis of the applicant's country of birth and category of sponsorship. The final step of the green card process, the Adjustment of Status application, may only be filed and approved when an immigrant visa slot is available. The importance of filing the Adjustment of Status applications is enormous to individuals, and often to employers. It brings applicants one step closer to the often long-awaited goal of permanent residence in the United States. In addition, it allows dependent family members to apply for employment authorization, and eventually may permit greater flexibility for changes to jobs or work locations, which may benefit both the individual and the employer.

Thousands of individuals who were sponsored by their employers for green cards, many of whom have been waiting for several years to file Adjustment of Status applications, responded to the initial July Visa Bulletin by *immediately* obtaining required medical examinations – typically at a cost of $100 or more per family member – and other necessary documents, changing international travel plans, and taking other steps to ensure that documentation and physical presence requirements were met in time to file the applications.

Rumors started circulating during the last week of June that the DOS and United States Citizenship and Immigration Services (USCIS) were looking for a technicality to halt the application filing frenzy and avoid the flood of applications that they anticipated receiving, starting on the first business day of July 2, 2007, and for the rest of the month. To everyone's horror, on July 2nd, DOS announced that all of the available visas had already been used up, even before the month had started and, therefore, the quotas would be completely closed for the month of July rather than completely opened. One hour later, USCIS announced that any I-485 applications that were submitted to them, including those that were already forwarded over the weekend and were being received on Monday, July 2nd, would be rejected.

In outrage, the immigrant community and organizations such as the American Immigration Lawyers Association made preparations to sue the government agencies for this inappropriate and unconscionable manipulation. A private employer filed suit as well.

Bowing to the public outcry, on Tuesday, July 17, USCIS announced that it revised the procedures for adjustment of status applications and that it would again accept employment-based applications to adjust status (Form I-485) (except for unskilled workers), for applications filed no later than August 17, 2007.

These inconsistent announcements, and flip-flopping, by USCIS and DOS have had a number of immediate negative ramifications. First, the entire situation led to a deep public mistrust of the government agencies charged with administering our immigration laws. In addition, as a practical matter, the USCIS has had to carve out special *and confusing* rules simply to accommodate this special filing period. For example, although the increased fee schedule takes effect July 30th (see below), USCIS has issued a rule to specifically maintain the original filing fees for Adjustment of Status and related application fees, to remain in place only until August 17th. USCIS also has suspended the premium processing program for Immigrant Visa Petitions (filed on Form I-140); it is unclear when the suspension will be lifted.

Immigrant visa availability for October 2007, the first month of Fiscal Year 2008, will be announced by the DOS in mid-September.

USCIS Publishes Final Rule on the New Fee Schedule

The adjusted fee schedule for USCIS benefit applications and petitions, including nonimmigrant applications and visa petitions, went into effect on July 30th. These fees fund the cost of processing applications and petitions for immigration benefits and services, and USCIS's associated operating costs. USCIS notified the public that they are revising these fees because, in their view, the prior fee schedule did not adequately reflect current USCIS processes or recover the full costs of services provided by USCIS.

Many commenters objected to the steep fee increases as inappropriate in view of long processing delays. By way of example, the fee increase for the Form I-140 petition for an immigrant worker rose from $195 to $495, and the Form I-129 petition for a nonimmigrant worker increased from $190 to $320.

One of the most marked changes occurred with the I-485 application to adjust status to that of permanent resident. Under the final rule, the standard fee for filing a Form I-485 by an individual will be $1,010 (including biometrics); the fee for a child under the age of fourteen years will be $600 when submitted concurrently with the application of a parent. The overall size of the increase for the Adjustment of Status Application fee from $395 to $1,010 is quite substantial. A large part of the fee increase for the Form I-485 was driven by the packaging or ``bundling'' of related benefits with no separate fee. Factoring in separate fees, applicants typically pay for additional services related to the Form I-485 for which they will no longer pay separately. As noted above, I-485 applications filed through August 17, 2007 are subject to the prior fee schedule.

Key Changes to Labor Certification Program Become Effective; Employer Must Pay for Application

On July 16, 2007, the U.S. Department of Labor's (DOL) final rule, implementing a number of key changes in the labor certification program, went into effect. In an effort to make the labor certification program less susceptible to fraud, the rule limits the validity of labor certifications to 180 days, explicitly prohibits the "sale, barter or purchase" of labor certifications, and ends the long-standing permissible practice of "substituting" a new individual into a labor certification that was approved on behalf of another individual, among other changes.

An additional important change is the new requirement that the employer pay for all costs of preparing and filing the application for a labor certification. This impacts many employers who until now have allowed their employees seeking permanent residence to retain attorneys to prepare the application and pay for the associated advertising costs. There is only one, narrow exception to this rule in situations in which a third party benefits from the individual's services to the employer as a result of an established business relationship. It is noteworthy, however, that the labor certification is only the first of three steps in obtaining permanent residence, and neither this rule nor any Department of Homeland Security (DHS) regulation requires the employer to pay for the two later steps of the permanent residence application process.

Landmark Decision: Federal Court Overturns Local Immigration Ordinance

Last week, in the first trial decision of its kind, a federal district court overturned Hazelton, Pennsylvania's local immigration-related ordinance, sending the message that states and municipalities may not easily preempt the federal government's exclusive authority to regulate immigration. Under Hazelton's "Illegal Immigration Relief Act" passed in July 2006, businesses and landlords were required to confirm that their customers and tenants were legal residents before providing them with services. Additionally, business owners would be fined and lose their licenses for hiring unauthorized workers. Hazleton Mayor Louis Barletta argued that this ordinance would cut crime and violence in his town, making Hazleton, "the toughest place on illegal immigrants in America." Immigrant advocacy groups vigorously challenged this ordinance claiming that the laws were unconstitutional, discriminatory, and violated federal civil rights law. The federal judge in his decision last week agreed with the immigrant groups and found that the ordinance violated the U.S. Constitution because it did not afford illegal immigrants with the protection of due process, and it undermined the federal government's exclusive power to regulate immigration. The town is expected to appeal this decision.

In our next newsletter, we will provide a comprehensive update on other local and state immigration laws affecting employers.

New J-1 Regulations Bring Further Scrutiny of Training Programs

This month, the DOS took the next step in a pattern of increased scrutiny and regulation of the J-1 Exchange Visitor program that followed the events of September 11, 2001. The DOS's newest rule, which became effective on July 19, 2007, takes further steps to ensure that participants in J-1 training programs are engaging in a program that will train them for a career abroad, rather than filling jobs that would otherwise be filled by U.S. workers.

The rule requires trainees to have a significant background in the field of training before coming to the U.S. Those with a certificate or degree from a foreign post-secondary academic institution must have one year of foreign work experience in the field. Those without a foreign certificate or degree must have five years of foreign work experience in the field. As a counterbalance to this new restriction on admission to a trainee program, the new regulations create a new 12-month "internship" program that is designed for students or recent graduates of foreign post-secondary institutions.

The rule also places increased responsibility and administrative burdens on the sponsoring entities. It requires that sponsors ensure that host organizations at which trainees and interns have been placed have signed off on a formal placement plan, will provide a program that expands upon the trainee's existing knowledge and skills, have sufficient resources to train and supervise trainees, and do not use trainees to displace U.S. workers. Sponsors must screen prospective trainees through in-person interviews and collect identifying and background information on host organizations. In many cases, sponsors also are required to perform a site visit of the host organization to verify that it has the ability to provide "structured and guided work-based learning experiences." Additional restrictions are required for sponsors of "hospitality and tourism" and "flight training" programs.

DOS Announces Temporary Travel Flexibility within Western Hemisphere for U.S. Passport Applicants and Government's Pledge To Reduce Passport Waiting Time

The DOS and the DHS announced on June 8, 2007 that, through September 30, 2007, U.S. Citizens traveling to Canada, Mexico, the Caribbean, and Bermuda who have applied for, but not yet received, passports can nevertheless temporarily enter and depart the U.S. by air with a government-issued photo identification and official proof of application for a passport.

The federal government is making this accommodation for air travel due to longer than expected processing times for passport applications in the face of record-breaking demand.

On June 19, the federal government announced plans to to cut the waiting time for passports, as senators complained their phone lines were jammed by furious citizens caught up in a backlog of some 3 million applications. The current wait time for some U.S. citizens is up to three months, double the normal time span. Assistant Secretary of State Maura Harty pledged an improvement. "By the end of September, we will get to eight weeks, and by the end of the year, back to six weeks" processing time, Harty told a Senate Foreign Relations subcommittee. Harty acknowledged officials had failed to predict how many Americans would apply for a passport immediately once the new rules – requiring air travelers to Canada, Mexico, the Caribbean, and Bermuda to carry a valid U.S. passport – took effect in January. Approximately 5.4 million passport applications were filed in just a few months, and extraordinary measures have been taken to try to cope with them, she said. Congress is contemplating a longer phase-in for similar passport rules for people driving or taking a boat back to the U.S. The House of Representatives last week approved a postponement until mid-2009, and the proposed delay is pending in the Senate.

Summer Travel Season Means Delays at Consulates and Airports

At this time of year, many people, including foreign nationals, travel home to see friends and family. Foreign nationals who are traveling internationally and intend to apply for a nonimmigrant visa must keep in mind that delays at U.S. Consulates for appointments and visa processing can impact their ability to return to the United States and work in a timely manner.

Foreign nationals who must renew or apply for a visa during this time of year may be subject to delays in obtaining appointments at U. S. Consulates around the world. Currently, most U.S. Consulates are scheduling appointments a few days to a few weeks in advance. However, there are exceptions, such as Bern, which is scheduling appointments 60 days in advance, and the U.S. Consulates in Canada, some of which have delays of more than two months (Ottawa 41 days and Vancouver 60 days).

Once a foreign national has obtained a nonimmigrant visa appointment and attends the interview, s/he generally has to wait for the visa to be issued. Again, there is a potential for delay, especially this time of year. In Canada, the delay is only two or three days between the interview and visa issuance. However, in Mexico, delays average 30 days. This type of delay makes a trip home for the summer holidays difficult and possibly impractical.

In addition, there is always the possibility that visa issuance may be delayed by security checks and clearances. If this occurs, the delays last a minimum of three weeks from the date of the interview to visa issuance, but can last as long as three months, or more.

Because there are so many opportunities for delays, we suggest that foreign nationals make their visa appointments prior to leaving the United States and build in sufficient time to wait for visa issuance. Visa applicants should check the websites of the U.S. Consulates in their home countries for information regarding visa appointments, processing times and required documentation. Further, contingency plans should be in place in case of extended delays so that personal and professional obligations in the U.S. are met. Although preparedness and planning isn't a panacea, it will better prepare the visa applicant, and the employer, to deal with delays when and if they occur.

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Immigration and Nationality Law Update is published by Proskauer Rose's Immigration Law Practice Group. This newsletter identifies and discusses recent developments relating to the field of U.S. Immigration and Nationality Law, which would be of interest to the corporate employer.

Proskauer Rose LLP counsels corporate clients and their employees in all areas of immigration, nationality and consular law. This includes obtaining work authorizations and visas to enable companies to hire aliens or transfer personnel between nations; compliance with and defense of anti-discrimination and unlawful immigration practices; and advice and appearances in special circumstance matters such as asylum claims and removal proceedings. Much of the work involves obtaining appropriate non-immigrant or immigrant visas to enable corporations to transfer executives, managers, persons with specialized knowledge or other key personnel temporarily or permanently to the United States.

For more information contact:

David Grunblatt
973.274.6021 – dgrunblatt@proskauer.com

Avram E. Morell
973.274.3263 – amorell@proskauer.com

Christine Alber
973.274.3243 – calber@proskauer.com

Jennifer Wexler
212.969.3318 – jwexler@proskauer.com

Praveena Nallainathan
973.274.3255 – pnallainathan@proskauer.com

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