Proskauer

Immigration & Nationality Law Update

April 2007

2007 Sets Record for H-1B Filings

In what came as no surprise to those in the Immigration community and with shock to many others, April 2, 2007 has set a new record for the most number of H-1B Petitions received in a single day. As many are aware, the first day USCIS would accept H-1B Petitions for fiscal year 2008 (start date of October 1, 2007), was April 2, 2007. USCIS reported that the total number of filings received on April 2 exceeded 123,000. Since the maximum number of H-1B visas that can be issued each year (also known as the H-1B Cap) is less than 65,000, USCIS applied a regulation whereby the determination of which cases would be accepted for processing would be conducted by lottery, including petitions received on April 2 and the following day, April 3. USCIS assigned each case a unique identifier and utilized a computerized lottery program to select the cases. Those cases which were selected are being processed, while those not selected will be returned.

Of course, the exhaustion of the H-1B Cap on the first day and the fact that many applications will be rejected has been a concern to many. Comprehensive immigration reform has been on the national stage recently, and an important component has been a provision to increase the H-1B Cap allocation and other measures targeted at making sure U.S. employers are able to employ the best and brightest the world has to offer. Some plans, including the recently introduced High-Tech Worker Relief Act of 2007, have sought to separate certain issues, including the H-1B Cap, from comprehensive immigration reform. However, even those types of plans are controversial and are, in many respects, Band-Aids not solving the much larger problem of the US demand for foreign professional workers. For example, the High Tech Worker Relief Act of 2007 which grants a short term increase of H-1B visas would return the H-1B Cap to 65,000 in 2009.

Please note that, as of the publication of this update, USCIS indicated that, as of April 26, 2007, there were slightly more than 300 H-1B visa numbers still available for the holders of U.S. Master's degrees.

Worksite Enforcement on the Rise

Over the past year, the Bush administration has stepped-up immigration enforcement in an effort to tighten worksite enforcement and stem the million plus annual influx of job-seeking illegal immigrants. The administration has increased these enforcement efforts over recent months, using both penalties and incentives in an effort to build a credible stance for comprehensive immigration reform that includes a guest worker program and paths to citizenship for some of the 12 million undocumented immigrants currently in the country.

Over the past year, there has been a significant increase in worksite raids – resulting in a tenfold increase in worksite arrests from 2002 to 2006. Yet, while government officials have touted these enforcement statistics, they have acknowledged that they must obtain assistance from employers if they are going to fully address illegal alien employment. Accordingly, the government attempted to hold employers further accountable for enforcing federal immigration laws and has created several voluntary partnership programs offering to spare employers from federal immigration raids if they voluntarily submit employees' work authorization documents. These programs include the Immigration and Customs Enforcement Mutual Agreement between Government and Employers, or IMAGE program, which encourages employers to submit to an audit of their employees' work eligibility documentation – also known as I-9 employee verification documents – and to ensure the accuracy of their wage reporting by verifying their employees' Social Security numbers.

Employers should be reluctant to participate in these partnerships with ICE, however, as cooperation has perhaps in some instances facilitated rather than prevented immigration raids at companies such as Smithfield Foods Inc. and Swift & Co.

Smithfield Foods Inc., which operates the world's largest hog slaughterhouse in Tar Heel, N.C., has participated in the IMAGE program since June 2006. In November 2006, ICE notified Smithfield that 541 workers of the plant's workforce of 5,000 had Social Security numbers that did not match government records. Smithfield then fired upward of 50 workers thought to be illegal immigrants and put additional workers on notice of termination, which prompted a walk-out by nearly 1,000 employees. Following the two-day disruption in production, the company ended the walk-out by rehiring the terminated workers and giving them an additional 60 days to verify their employment eligibility. On January 24, 2007, federal agents arrived at Smithfield's facility and arrested 21 workers on immigration charges. The following day, hundreds of Latino workers refused to go to work, fearing they too would be arrested by immigration officials. Faced again with a disruption in production, Smithfield tried to persuade Latino workers to return to work, including placing advertisements on a Spanish language radio station. Many have still not returned.

Swift & Co., the nation's third-largest producer of fresh beef and pork, similarly experienced adverse consequences after voluntarily sharing employee documentation with ICE. Swift has participated in the Basic Pilot program since 1997. After company officials learned that ICE and the U.S. Department of Justice had been targeting the company in Spring 2006, Swift repeatedly offered to work with federal officials to identify and round up specific employees wanted for questioning. In December, when company officials obtained notice that an immigration raid was imminent, Swift unsuccessfully tried to block the raids in a Texas federal court, arguing that the raids would be unnecessarily disruptive of the company's operation. Then, on December 12, 2006, ICE raided six of Swift's seven facilities across the country and rounded up almost 1,300 of the company's 15,000 employees. The lesson from Smithfield and Swift seems to be that participation with ICE is more likely to coincide with federal immigration raids, increased exposure to employee lawsuits, lost profits, and negative publicity.

Yet, employers must maintain their employee population and protect themselves against immigration raids and negative publicity by performing their own internal employment verification and abiding by the following "Best Practice Tips." Companies must also have policies and guidelines in place in order to avoid discrimination while implementing these "Best Practices."

- First, employers must maintain and update I-9 employment verification records for both the employee and the employer to attest verification of identity and eligibility documents, whether on paper or electronically. Employers can ensure this by implementing policies and guidelines regarding intake procedures, document evaluation, and form re-verification, as well as ensuring quality control of staffing.
- Employers must also implement policies and accountability for the status of independent contractors. Companies have the responsibility for independent contractors it knows, or should have known, are unauthorized to work. Accordingly, the company must implement guidelines for satisfying the due diligence requirement, while not unnecessarily assuming additional liability.
- In addition, employers must implement a policy on responding to information that could constitute knowledge of undocumented status of employees. Companies must coordinate institutional knowledge to assess potential organizational liability and determine when there is a duty to investigate further.
- Finally, employers must have a policy in place to deal with and attempt to resolve Social Security number mismatches. Employers are notified of "mismatched" Social Security numbers when an employee's name and social security number, as submitted on Form W-4, do not match the name and social security number in the Social Security Administration records. A mismatch may be a sign of many problems, but not necessarily that the employee is in the country illegally.

Visa Bulletin Update

On April 11, 2007, the Department of State published the May 2007 Visa Bulletin. While visa availability for most categories remained unchanged, significant movement was made in the EB-3 Category for the Philippines and All Other where visa number availability advanced an entire year to August 1, 2003. Once an individual's priority date for his or her visa category becomes current, the individual is eligible to pursue his or her application for permanent residence through immigrant visa processing at a U.S. Embassy or Consulate or through Adjustment of status if they are currently in the U.S.

H-2B Cap for Fiscal Year 2007 Reached

On March 23, 2007, USCIS announced that it as of March 16, 2007, had received a sufficient number of petitions to reach the maximum of 33,000 H-2B visas for the second half of fiscal year 2007 (for start dates between April 1 and September 30, 2007). All petitions received after March 16th will be returned to filers. The H-2B Cap will not apply to those individuals classifiable as "returning workers" meaning they had previously been counted towards the cap between October 1, 2003 and September 30, 2006.

H-2B workers are seasonal or peek load workers often found in the agricultural, hospitality and logging industries, whose employers have obtained a temporary labor certification from the Department of Labor certifying that there is not a sufficient number of workers for the positions in that geographic area.

In 2005, Congress amended the Immigration and Nationality Act to divide the annual cap of 66,000 H-2B visas to 33,000 for the first half of the fiscal year and 33,000 to the second half in a effort to provide equality to seasonal employers who compete for H-2B labor at different times of the year. Without this allocation, employers whose needs occur during the first half of the fiscal year could use all of the available visas before employers whose needs occur in the second half of the year had an opportunity to file.

U.S. Consulates to Resume Processing of I-130 Petitions

On March 26, 2007, USCIS announced that U.S. Embassy and Consulates abroad would resume processing of family based immigrant petitions (I-130 Petitions) from U.S. citizens or permanent residents residing abroad. Accordingly, eligible individuals, such as a U.S. citizen with a foreign national spouse, may once again submit the immediate relative petition directly to the Consulate, which will process the petition and the foreign national spouse’s subsequent immigrant visa application.

On February 8, 2007, Embassies and Consulates were instructed to stop accepting I-130 Petitions because of difficulty in ensuring that the provisions of the Adam Walsh Child Protection and Safety Act were being properly implemented. Since that time USCIS and the Department of State have developed policies and procedures to ensure that U.S. Embassies and Consulates could properly process these applications.

Consular Post Closures/Delays

On April 16, 2007, the Department of State announced that the U.S. Consulate in Casablanca, Morocco will be closed indefinitely, pending a security review. The consulate will still provide services to American citizens and may, in the most extreme cases, process emergency visa applications.

On March 23, 2007, the Department of State announced that consular services at the U.S. Consulate in Sydney, Australia would be cut back significantly from mid-July to mid-September 2007, and a complete closure to all routine services for the last week of August and the first week of September, due to the Asia Pacific Economic Cooperation (APEC) forum. A duty officer will be available for American citizen emergencies. Individuals are advised to apply for travel visas as early as possible or to plan to apply for visas at other consular posts in Australia.