

## Recent Developments in Immigration Law

### Legislation Update: President Signs Bill with Major Changes to the H-1B & L-1 Nonimmigrant Visa Categories

On December 8, 2004, President Bush signed into law the Omnibus Appropriations Bill (H.R. 4818), which includes several major changes to L-1 and H-1B nonimmigrant visa categories. The short titles are “L-1 Visa (Intra Company Transferee) Reform Act of 2004” and the “H-1B Reform Act of 2004.” The press releases issued by USCIS (United States Citizenship and Immigration Service) explaining these changes can be viewed at <http://www.uscis.gov>.

The new law makes the following changes:

#### **L-1 Changes**

1. L-1B visa holder may not be primarily stationed at the work site of another employer in cases where:

The L-1B visa holder will be controlled and supervised by an unaffiliated employer, or;

The placement of the L-1B visa holder at the third-party site is part of an arrangement to provide labor for the third party rather than placement at the third-party site in connection with the provision of a product or service involving specialized knowledge specific to the petitioning employer.

The change applies to the initial, extended or amended petitions filed on or after June 6, 2005.

2. L-1 visa applicant under an approved blanket L must show 12 months of continuous employment instead of 6 with the foreign entity

The effective date of this change applies to petitions for initial classification filed after June 6, 2005.

3. Mandates the following:

Department of Homeland Security (DHS) must gather statistics on the number of nonimmigrants who are classified in the L-1B category and the number of nonimmigrants who will work primarily offsite.

No later than 6 months after the date of enactment, the Inspector General (IG) of DHS shall examine and report to the House and Senate Judiciary committees on the vulnerabilities and the potential abuses in the L visa program.

Development of an L Visa Interagency Task Force no later than 6 months after the date of enactment.

Included in the task force are representatives from DHS, DOS (Department of State) and DOJ (Department of Justice). The Task Force is to report to the Judiciary Committees of the House and Senate on the efforts to implement the IG's recommendations and to make other suggestions to Congress for new legislation.

The effective date of these changes is no later than 6 months after December 8, 2004.

## **H-1B Changes**

1. *Non-displacement attestation*: Makes permanent the provision requiring non-displacement attestation of the LCA (Labor Condition Application) by employers who are H-1B dependent or who have committed a willful failure or misrepresentation during the preceding 5 years.

The effective date is March 8, 2005.

2. *Prevailing Wage*: Removes the 5 percent variance on prevailing wage determinations. The Department of Labor (DOL) is to provide at least 4 wage levels in future surveys. If the existing DOL survey provides only 2 levels, the law creates a formula for determining 2 intermediate levels.

The effective date is March 8, 2005.

3. *New Visa Numbers*: Exempts from the fiscal year numerical quota foreign nationals who have graduated from an American university or college with a master's or higher degree. This exemption is capped at 20,000 per fiscal year. After the 20,000 slots are used, the USCIS is required to count those cases against the cap for the remainder of the fiscal year.

Petitions under this exemption can be filed no earlier than March 8, 2005.

4. *DOL Investigations*: Reinstates and makes permanent the ability of DOL to initiate an investigation of an employer if there is "reasonable cause" that the employer is not in compliance with its LCA requirements. The DOL must certify that reasonable cause exists, which can include "credible information from a known source likely to have knowledge of an employer's practices or conditions." Such information must be obtained from a source other than DOL or lawfully obtained by DOL pursuant to another investigation. The investigation must be initiated within 12 months of the employer's alleged failure to comply. The DOL investigation may last no more than 60 days and, if there is evidence of a violation, DOL must provide notice to the employer and an opportunity for a hearing. The hearing must take place within 120 days. A good faith compliance defense is available.

The effective date of this change is December 8, 2004.

5. *Reporting*: The Secretary of Labor is to report to Congress each January on the investigations undertaken by the DOL.

The effective date of these changes is 90 days after date of enactment.

6. *Filing fee*: Adds an additional filing fee of \$1500 as a "training and scholarship fee." Employers with 25 or fewer domestic employees are required to pay 1/2 of this fee (i.e., \$750.)

Note that this fee is in addition to the current petition processing fee of \$185 and the applicable consular visa application fees, if any.

The new fee takes effect on all petitions (new, extensions or amendments) filed after December 8, 2004.

## **Changes Affecting Both L-1 and H-1B Categories**

1. *Filing fees*: Creates a new \$500 "fraud prevention and detection" fee for each petition, including blanket L application submitted directly to an American consulate abroad. The fee is for the principal applicant only (i.e., not for spouse and children) and is required for both the initial petition and any application to change employers. The law does not specifically require this fee for extensions or amendments.

The new fee takes effect on new petitions filed after March 8, 2005. Extensions and amended petitions are exempt.

2. *Allocation of fees*: Changes how fees collected are allocated, including the formula used to determine amounts awarded to job training, scholarship and grant programs. The law would re-authorize the DOL to award grants to job training providers for industries and economic sectors that are projected to experience significant growth. The National Science Foundation is authorized to continue to award scholarships for computer science or other technology or science programs and increases the amount of such awards from \$3,125 to \$10,000.

The effective date of these changes is December 8, 2004.

The DHS and the DOL will need to publish implementing regulations to define the law's new terms and to explain how the changes are to be implemented. In addition, the DHS and DOL will need to develop and implement new or amended forms for the public dissemination. Given the history of the government's lengthy delays in the publication of regulations, employers and their legal counsel will have to rely exclusively on the statutory language in the meantime.

## **United States Citizenship and Immigration Services (USCIS)**

### ***Permanent Resident Cards ("Green Cards"): New Department of Homeland Security Seal***

On November 15, 2004, USCIS announced that it is now incorporating the U.S. Department of Homeland Security's (DHS) Seal onto Permanent Resident Cards, commonly known as "Green Cards." Permanent Resident Cards provide evidence of a foreign national's legal right to work and reside in the United States. The DHS Seal now appears in the middle of the front of the Permanent Resident Card and prominently mentions the DHS on the back of the card as well.

USCIS emphasizes that all previously issued Permanent Resident Cards (with information relating to the former Immigration and Naturalization Service) remain valid until their expiration, or are otherwise recalled by DHS.

### ***USCIS Centralizes Filings for Certain Applications Normally Filed with District Offices***

USCIS is expanding its Direct Mail Program to provide that certain filings of Form I-485, Application to Register Permanent Residence or Adjust Status; Form I-765, Application for Employment Authorization; and Form I-131, Application for Travel Document, be filed at a designated Chicago, Illinois, facility for initial processing. USCIS intends that standardization, elimination of duplicative work and increased staff productivity resulting from this centralization will streamline overall processing.

The Direct Mail Program is being implemented in two phases based on jurisdiction. As of December 1, 2004, subject filings are to be filed with the Chicago facility for foreign nationals living in Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming, as well as the District of Columbia, Guam, Puerto Rico and the Virgin Islands of the United States. Beginning April 1, 2005, subject filings are to be filed

with the Chicago facility for foreign nationals living in Alaska, California, Idaho, Iowa, Kansas, Maryland, Missouri, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Texas and Washington.

In general, the change only affects the filing procedure for cases normally filed with local USCIS District Offices, include many family-based cases, diversity lottery adjustments, and several others. Cases normally filed with the USCIS Regional Service Centers will not change.

## **U.S. Department of State (DOS)**

### ***Diversity Visa Lottery Program***

Applications for the 2006 Diversity Visa Lottery Program (DV-2006) continue to be accepted by DOS ; the application entry period will close on January 7, 2005 (12 p.m., EST). All applications must be filed via the Internet. No applications will be accepted by mail or other alternate form.

Applications can be submitted via the following Web address:

<http://www.dvlottery.state.gov>

Instructions and an overview of DV-2006 may currently be viewed at the following Web address:

[http://travel.state.gov/visa/immigrants\\_types\\_diversity8.html](http://travel.state.gov/visa/immigrants_types_diversity8.html)

For further information regarding DV-2006, including a brief review of eligibility requirements and processing issues, please see our October 2004 issue of *Recent Developments in Immigration Law* at:

[http://www.duanemorris.com/alerts/static/A\\_Imm101904.pdf](http://www.duanemorris.com/alerts/static/A_Imm101904.pdf)

## **U.S. Department of Labor (DOL)**

### ***Labor Certifications: Backlog Reduction Centers (BRCs) and PERM (Program Electronic Review Management) Updates***

As discussed in our November 2004 issue of *Recent Developments in Immigration Law*, the DOL has recently established two Backlog Reduction Centers (BRCs) that are located in Philadelphia and Dallas to handle the large number of labor certification applications pending adjudication. The BRCs are now beginning to review labor certification applications transferred to them from state and federal DOL offices.

On November 29, 2004, DOL published a notice in the Federal Register acknowledging the relocation of its Foreign Labor Certification Staff in the Dallas and Philadelphia Regional Offices of DOL to the Dallas and Philadelphia BRCs. Labor certification adjudication that was previously carried out at the Dallas or Philadelphia DOL Regional Offices will now be performed by the Dallas or Philadelphia BRCs.

The notice also states that DOL will publish a notice in the Federal Register shortly that will provide guidance as to how backlogged labor certification cases located at the State Workforce Agencies (SWAs) will be handled in the near future.

## Government Processing Times

USCIS, Service Centers and District Offices, Case Specific Updates:

<https://egov.immigration.gov/cris/jsps/index.jsp>

DOL, Alien Labor Certification Processing Times, Regular Permanent, RIR (Reduction in Recruitment):

<http://workforcesecurity.doleta.gov/foreign/times.asp>

DOS, Consular Nonimmigrant Visa Appointments / Average Processing Estimates

[http://www.travel.state.gov/visa/tempvisitors\\_wait.php](http://www.travel.state.gov/visa/tempvisitors_wait.php)

DOS, Visa Bulletin:

[http://travel.state.gov/visa/frvi\\_bulletincurrent.html](http://travel.state.gov/visa/frvi_bulletincurrent.html)

## For Further Information

If you have any questions regarding changes in the law and agency practices, including how these changes may affect your business, or if you would like to discuss how to hire and retain foreign nationals on your workforce, please contact one of the members of the **Immigration Group** below or the lawyer in the firm with whom you are regularly in contact.

<b>Washington, D.C.</b> Denyse Sabagh	202.776.7817	dsabagh@duanemorris.com
<b>San Francisco</b> Lisa Spiegel Clark M. Trevor Alan Curtis Perkins	415.371.2269 415.371.2209 415.371.2240	lspiegel@duanemorris.com cmtrevor@duanemorris.com acperkins@duanemorris.com  <i>www.duanemorris.com</i>