

## **RECENT DEVELOPMENTS IN U.S. IMMIGRATION LAW**

### **THE H-1B CAP – A LOOK AHEAD**

The H-1B visa is the standard visa for the temporary employment of professionals in the United States. As of 2004, the number of new H-1B approvals that can be issued in any fiscal year of the Citizenship and Immigration Service ("CIS") (October 1<sup>st</sup> through September 30<sup>th</sup>) is now 65,000. This H-1B cap number represents a statutory reduction from the much larger cap of 195,000 new H-1B approvals that existed for the 2002 and 2003 fiscal years of the CIS. It is important to note that not all H-1B approvals are counted against the annual H-1B cap – generally speaking, persons who have held H-1B status within the past 6 years and who have not left the U.S. for more than one year may extend their H-1B status with a current employer or switch H-1B sponsorship to a new employer without being subject to the H-1B cap's numerical restrictions.

Unfortunately, it appears that, even with these exemptions from the cap, 65,000 new H-1B approvals are simply not sufficient to meet the needs of U.S. employers. As a result of the statutory reduction in available H-1B numbers in 2004, the H-1B cap was reached on February 17, 2004. Since that date, new H-1B cases that have been filed can only be approved with an effective date on or after October 1, 2004. This has meant significant hardship for both employers and employees who in many cases have had to delay commencement of their employment relationship until October 1, 2004.

In addition, the fact that the number of available H-1B approvals was exhausted so early in 2004 means that continued demand for H-1B approvals has already spilled into the quota for the 2005 fiscal year. As of May 30, 2004, the CIS did a sweep of all approved and pending new H-1B cases which will be allocated to the 2005 fiscal year of the CIS (beginning on October 1, 2004) and determined that there were approximately 16,000 such cases. Based on a projection of the rate of filing, the number of "pipeline" cases that will be filed and pending as of October 1, 2004, (and thus chargeable against the 2005 cap) will be between 35,000 and 40,000 of the available 65,000 H-1B new approvals. If this turns out to be the case, employers will face the possibility of CIS running out of new H-1B approvals as early as the end of 2004.

While it is difficult to plan ahead in this area, employers should survey now in particular those of their employees

who are in the United States in F-1 or J-1 student visa status and who have obtained "practical training" authorization that will expire sometime in 2005. Customarily, employers wait to convert these "practical training" authorized employees to H-1B status until several months before their "practical training" authorization ends. If the H-1B cap is reached before an F-1 or J-1 student has changed status to H-1B, that student will have to stop working at the end of their period of "practical training" and may have to return home until October 1, 2005, when their new H-1B visa petition is activated. Accordingly, for employees whose "practical training" authorization ends after January of 2005, employers would be advised to consider converting them to H-1B status before the end of the year.

### **THE RECENTLY ISSUED "H-1B CAP GAP MEMORANDUM"**

On July 23, 2004, the CIS finally issued long-awaited guidance for foreign students in F-1 or J-1 status that will expire before October 1, 2004 and who are subject to the H-1B cap. The so-called "Cap Gap Memorandum" provides that an F-1 or J-1 student whose employer has filed a new H-1B visa petition and change of status application prior to July 30, 2004 with an effective date of no later than October 1, 2004, that is subject to the H-1B cap, and whose F-1 or J-1 status will expire before October 1, 2004, may remain in the United States in valid legal status until the later of October 1, 2004 or the date that the case is approved. Prior to the issuance of the Cap Gap Memorandum, F-1 and J-1 students in this situation would have to stop working at the end of their period of "practical training" and possibly have to return home until October 1, 2004, at which point they could apply for new H-1B visas and re-enter the United States.

A foreign national covered by this provision is not permitted to work for the U.S. employer during the "gap" period, or to travel outside of the United States between the end of his authorized F-1 or J-1 stay and the beginning of his H-1B approval. The Cap Gap Memorandum will also apply to the spouse and children of F-1 and J-1 students who apply for a change of status to derivative H-4 visa status prior to the July 30, 2004 deadline.

### **UPDATE ON TEMPORARY VISA ISSUANCES AND REVALIDATIONS**

In the wake of the 9/11 attacks, the new Department of Homeland Security has made a series of changes to the process by which foreign nationals may obtain temporary or "nonimmigrant" visas (H-1B, L-1, B-1/B-2, F-1, etc.) to enter the United States. These changes, which are summarized below, have increased the ability of the United States to identify criminals and terrorists who may be seeking to enter the United States, but have also resulted in significant

delays in visa processing that U.S. employers and their foreign employees need to understand and plan for.

#### *The New Appointment-Based Visa Application System*

Prior to 2003, most U.S. Consulates around the world had relatively streamlined procedures in place for foreign nationals applying for visas. In many cases, applications could be made in person and visas would be issued on the same day. Beginning in January of 2003, however, most U.S. Consulates have switched to a system whereby a visa applicant must make an appointment (by phone or email) to apply for their visa. Unfortunately, the required appointment system combined with additional security checks (described below) has meant that in many countries an appointment must be made weeks in advance of the actual application. As a result, foreign nationals who were used to simply returning home for a one or two week vacation and applying for a new visa may find, if they don't plan in advance, that the earliest available visa application appointment is weeks after their planned trip. Accordingly, it is critical for your foreign employees who may be traveling abroad to plan in advance for their visa application. Note that most U.S. Consulates now maintain useful web sites with detailed information on the new visa application process, all of which can be accessed through the U.S. State Department web site at [www.state.gov](http://www.state.gov).

#### *A New System of Security Checks*

Legislation after 9/11 implemented a new system of security checks that have had a profound effect on the processing of nonimmigrant visas. Specifically, the Border Security Act of 2002 implemented a broad security check system known as the "Interagency Border Inspection System" or "IBIS". An IBIS check must now be done with respect to every applicant for a nonimmigrant visa at a US Consulate abroad. The IBIS computerized database contains information concerning terrorists as well as persons with criminal records and prior U.S. immigration violations.

When a foreign national applies for a nonimmigrant visa at a U.S. Consulate abroad, the Consular officer is required to perform an IBIS check by running the name of the applicant (as well as numerous alternative spellings of the name) through the computerized database. If the IBIS check yields a "hit" and the Consular officer is unable to immediately determine that the "hit" is not the same person as the applicant (because, for instance, of gender or age), then the Consular officer is required to conduct a formal investigation to determine the applicant's eligibility for the

visa. In most cases, this formal investigation is performed by the State Department or the Central Intelligence Agency in the United States and can take anywhere from 30 days to four to six months. During this time, the visa application is placed on hold and the applicant is effectively stranded abroad.

While the number of false "hits" is not great, it is certainly more than *de minimis*. Unfortunately, there is no way of knowing in advance whether an IBIS check will yield a false hit. Foreign employees should therefore be aware of the possibility that a routine trip home, during which a new visa is applied for, may result in their being stuck outside of the United States for a period of several months. Due to this increased risk, foreign employees should be encouraged to consider any prior minor immigration problems (such as the overstay of the validity of a tourist visa) or criminal problems (such as DUI convictions), which could come to light in an IBIS check and cause significant delays in their obtaining a U.S. visa.

#### *The End of Visa Revalidation*

Previously, in response to the delays in nonimmigrant visa processing and the risk of an IBIS security check "hit" discussed above, employees were strongly encouraged to apply to renew their H-1B and L-1 visas by mail through the U.S. State Department. This so-called "visa revalidation" procedure, although taking 8 to 10 weeks to complete, had the advantage of allowing the foreign employee to apply for a new visa without leaving the United States.

Unfortunately, effective as of July 17, 2004, the U.S. State Department terminated the visa revalidation program in anticipation of the requirement, coming this fall, that computerized biometrics (fingerprints and photographs) be collected in connection with each visa issuance. The completion of a biometrics process requires that the applicant be present at the time of application, and thus the visa revalidation process, which was done by mail, is no longer viable.

The end of the visa revalidation process will only mean longer delays for processing visas at the already overburdened U.S. Consulates abroad and presumably an increased number of false-positive IBIS "hits" as a result of the increased application load. Accordingly, now more than ever, it is critical that employers be aware of the travel plans of their foreign employees and educate these employees as to the visa application process outside of the United States.

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