

C O N N E C T !

A MONTHLY NEWSLETTER ON BUSINESS IMMIGRATION

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WELCOME TO CONNECT!

Connect! focuses on business immigration issues that top the agenda in our nation's capital. This newsletter includes information useful to employers, such as updates on new legislation and regulations that will impact the business community's access to foreign workers, and articles that will help employers learn about the pitfalls and opportunities of our immigration laws. By working with members of Congress on these issues, employers can help shape our laws so that they are more responsive to, and respectful of, the business community's needs and concerns

LEGISLATIVE UPDATE

H Blackouts: New Fiscal Year Shuts Door on H-1B Visas, Signals Imminent Exhaustion of H-2B Visa Program

On October 1, 2004, the very first day of the new fiscal year, U.S. Citizenship and Immigration Services (USCIS) officials announced that the H-1B cap on visas for highly educated foreign professionals had been reached. Reports indicate that exhaustion of the cap on H-2B short-term workers may not be far behind. Unless Congress takes action during the current lame duck session that began on November 16 and will probably conclude on November 23, employers will be facing an H visa "blackout" for almost an entire year.

While the H-1B and H-2B programs deal with very different types of foreign workers, both programs fill a vital role for our nation's businesses and research institutions, small and large. Without access to H-1B visas, U.S. employers will be unable to hire the professionals with needed cutting-edge knowledge and skills—including recent graduates

from top U.S. universities with advanced degrees in math and science—to develop new products, engage in groundbreaking research, create new jobs, and compete in the global marketplace. There still are not enough U.S. students interested in pursuing advanced degrees to fill these highly specialized positions and, according to the Bureau of Labor Statistics, the demand for these graduates will only increase over time.

Foreign nationals account for roughly half of all Master's and PhD graduates in math, science and engineering. If we cannot keep this U.S.-educated talent in the U.S., our competitors abroad will profit. In fact, several European countries recently have updated their immigration laws to attract highly educated talent. An exemption from the H-1B cap for graduates from U.S. universities with advanced degrees is a workable solution that will help U.S. businesses and research institutions compete in the global marketplace, ensure that Americans have access to highly educated foreign professionals who

deliver needed public services, and help keep and create jobs in the U.S.

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While the H-1B program gives U.S. employers a means to access highly educated foreign professionals, the H-2B program is instrumental in providing

employers with essential workers where no U.S. workers are available. H-2B visa holders help keep the doors of American businesses open. These workers include restaurant, landscape, food production, and hotel service workers. They fill the rosters of our minor league hockey and baseball teams, teach our kids to ski, and repair helicopters that fight summer forest fires.

Currently the H-2B program is capped at 66,000 visas per year. This number has not been adjusted since the visa category was initially capped in 1990 yet, during that time, improvements in education and other factors have hampered U.S. employers' ability to find and hire willing American workers for seasonal positions. Without increased access to this visa category, many seasonal businesses across the nation will have to close their doors.

It is important that U.S. employers reach out to Congress during the lame duck session to urge their Senators and Representatives to increase access to needed professional and seasonal workers. The lame duck session will be the best opportunity to get a legislative fix for the H visa programs. Unless Congress hears about the need to protect employers' access to these programs, the full spectrum of American businesses will be negatively impacted. For more information on how your business will be affected by the H visa blackout and how you can reach out to Congress, contact your AILA attorney. ■

President Signs Law to Allow Electronic Completion and Storage of I-9s

The President on October 30 signed into law legislation that would allow employers to electronically complete and store employment eligibility verification (I-9) forms. Under prior law, employers were required to retain the I-9s on paper, microfilm or microfiche, either for three years after the date of hire or for one year after employment is terminated, whichever is later. Maintaining sufficient storage space to accommodate hard copies of I-9 forms had become a significant document management challenge for many companies, especially in industries with high employee turnover rates. The new law, originally introduced by Representative Chris Cannon (R-UT), now permits the use of handwritten or electronic signatures in completing the I-9 forms and allows employers to store the I-9s electronically, should they choose to do so.

This new law helps to modernize one aspect of the antiquated immigration law and is consistent with the Government Paperwork Elimination Act, which gave federal agencies until October 2003 to provide citizens the option of conducting business with the government electronically. That law also provides that electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form.

For more information on how electronic filing and signatures can be incorporated into your company's I-9 record storage, contact your AILA attorney. ■

Narrowly Targeted Intra-Company Transferee Bill Passes Senate Judiciary Committee

The L-1 visa allows American-based companies to bring qualified personnel from their operations abroad to the U.S. either to fill important executive or managerial positions, or to utilize their specialized knowledge of the company's operations, products, procedures, and services. The L-1 visa also has allowed foreign-based companies to invest in the U.S. economy by establishing and expanding business operations here. It is the principal immigration vehicle by which foreign companies build U.S. factories, open offices, and hire thousands of U.S. workers to staff their U.S. operations.

During this Congressional session, several bills were introduced that would limit the L program. All but one of the bills would significantly restrict the program, thereby dramatically reducing the benefits of the L-1 visa and hurting American workers and employers. Only S. 1635, introduced by Senator Chambliss (R-GA), would promote narrowly tailored reform that would strengthen the L program without hindering its benefits. On September 30, the Senate Judiciary Committee approved S. 1635. If this measure is not addressed during the lame duck session, it would have to be reintroduced in the 109th Congress.

Specifically, S. 1635 would modify the L-1B visa program to prohibit a visa holder from being primarily stationed at the worksite 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 bill also would eliminate the six-month work requirement for L-1 blanket petitions. Intracompany transferees would have to be employed for an entire year before becoming eligible for an L-1B visa.

In addition to changes in the L-1B program, the bill also would require the Department of Homeland Security to maintain statistics on petitions filed for L-1 visas, including the number of L-1B petitions approved where the visa holder will work primarily offsite.

Any legislation seeking to reform the L visa program must recognize that the L program is a vital tool for U.S. companies that have an international presence, and international firms looking to expand their offices to the U.S. If

Congress unnecessarily limits the legitimate use of this visa program, both foreign investment in the U.S. and the work of international companies based in the U.S. would be impeded, with the consequence that American jobs would be lost rather than protected.

For more information on the movement of this bill through Congress and how your business could be affected, please contact your AILA attorney. ■

AGENCY UPDATE

DHS to Test US-VISIT at Land Ports

Ensuring the speedy travel of international employees and clients across international borders is a high priority for most businesses in today's world. And when business travelers are entering the U.S., it is important that they are aware of a new entry-exit tracking program, the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program, which is rapidly expanding at the nation's ports of entry. *Connect!* continues to report on the latest updates on the expansion of US-VISIT as well as descriptions of the program so that you can properly prepare your business' international travelers.

In addition to the traditional admission procedure, the US-VISIT program uses digital fingerprints and a digital photograph to confirm a foreign national's identity and track his or her entry into the U.S. At a limited number of test sites, the US-VISIT

program also tracks departures from the country. This information is used to screen individuals and to ensure that foreign nationals do not remain in the country beyond their period of authorized admission. Failure of to comply with US-VISIT procedures could have negative consequences a foreign national's ability to remain in or re-enter the United States.

In the latest development, the DHS, on November 15, was scheduled to begin testing US-VISIT entry procedures at the land ports of entry in Douglas, Arizona, Port Huron, Michigan, and Laredo, Texas. Visa holders and Visa Waiver Program participants who enter at a land port with US-VISIT capabilities will have to register with US-VISIT (deemed "visited") in the secondary inspection area. These land ports will be added to US-VISIT operations at 114 of our nation's airports. Statutory deadlines require DHS to implement US-VISIT at the 50

busiest land ports of entry by the end of this calendar year.

Given the limited infrastructure and lanes leading into the land ports, it is very likely that US-VISIT will exacerbate the land ports' current delays. Unlike the airports, which deal with a single type of traveler, land ports must accommodate cars, commercial traffic, pedestrians and even bicycles.

Contact your AILA attorney to learn more about the US-VISIT program and to determine the entry and exit requirements for your foreign national employees and clients. ■

Changes to Visa Waiver Program Have Begun

Expedient travel for international personnel and clients is vital in today's global marketplace. Frequently, travelers coming to the U.S. for meetings, business deals, or conferences will take advantage of the Visa Waiver Program

(VWP). This program allows citizens of 27 countries, mainly located in Europe and Asia, to travel to the U.S without a visa for purposes of business or pleasure. However, recent changes to U.S. law have put additional requirements on the VWP. U.S. businesses should be aware of these changes in order to ensure that their international personnel or clients remain eligible for this program.

As of October 26, all visa waiver travelers must present a machine-readable passport (MRP) for entry into the U.S. The Department of Homeland Security issued an announcement that it has begun enforcing the law, but that it is taking steps to ease travelers into the new requirements. If a VWP traveler arrives in the U.S. without a proper MRP, the inspecting officer will have the discretion to issue that individual a one-time exemption. If such an exemption is granted and that individual arrives in the U.S. without a MRP a second time he will be denied entry into the U.S.

Individuals without a machine-readable passport cannot utilize the VWP and must first obtain a visa at the U.S. consulate. This extra step could delay a trip to the U.S. by weeks or months. However, reports indicate that during this

transition period some countries have decided to issue MRP at departure airports.

U.S. businesses also should be aware that, in addition to the MRP requirement, VWP participants are required to enroll in US-VISIT. These travelers should be prepared to have their index fingerprints taken along with a digital photo, and have their biographical information entered into the US-VISIT database. Along with this entry procedure, travelers enrolled in US-VISIT will be required to properly register their exit if there is an exit facility at their port of departure.

For more information on how upcoming changes to the Visa Waiver Program will affect your business, please contact your AILA attorney. ■

Visa Appointment Wait Times Available on Web

In business, “time is money” and time wasted waiting for a visa for international personnel or a client may lead to lost opportunities and broken deals. Therefore U.S. businesses and human resources personnel should be aware of a new service the State Department offers to help travelers estimate how long it will take to obtain a visa.

Recognizing that visa applications are subject to a greater degree of scrutiny than in the past, the State Department recently launched a new feature on its website (http://travel.state.gov/visa/temp_visitors_wait.php) that lists the wait times for interview appointment at each U.S. consulate abroad. The website also provides information on how long it is taking for that consulate to issue visas after the interview. This feature should permit Businesses and international travelers to better determine when they will actually be able to arrive in the U.S., and to plan accordingly.

The State Department also informs users that it is still reviewing the visa wait time information and that users may want to check directly with the embassy or consular sections to confirm the accuracy of the visa wait times. In addition, certain visa applications require additional security checks or special clearances. The times listed on the website do not reflect the time required to complete these additional checks.

Please contact your AILA Attorney for more information. ■

SPOTLIGHT

Congress Vets Bill to Enact 9/11 Commission's Recommendations

In the last issue of *Connect!*, we spotlighted the recommendations

of the National Commission on Terrorist Attacks upon the United States (9/11 Commission). In response to these recommendations, the House and Senate passed two very different

bills, S. 2845 and H.R. 10, respectively. S. 2845 is responsible, bipartisan legislation endorsed by the 9/11 Commission and the Steering Committee of 9-11 Families—the families of

victims of the terrorist attacks. S. 2845 seeks to implement the 9/11 Commission's recommendations and respect the idea as stated by the Commission that, "[t]he border and immigration system of the United States must remain a visible manifestation of our belief in freedom, democracy, global economic growth, and the rule of law, yet serve equally well as a vital element of counterterrorism."

In contrast, H.R. 10 is a fatally flawed bill that includes negative immigration-related provisions that would distract our government from effectively enhancing our security, threaten to stall the passage of needed reform, and make our immigration processes even more dysfunctional than they are today. H.R. 10 neither reflects the 9/11 Commission's recommendations nor heeds its admonition that "Our borders and immigration system, including law enforcement, ought to send a message of welcome, tolerance, and justice to members of the immigrant communities in the United States and in their countries of origin. We should reach out to immigrant communities." H.R. 10 does not "reach out to immigrant communities" and runs counter to the 9/11 Commission's recommendation. It will neither enhance our security nor bring our nation together. In addition, H.R. 10 was not a product of bipartisan discussion and Congress has not sufficiently reviewed the important issues raised.

Below are some of the troubling provisions that go far beyond the 9/11 Commission's recommendations:

- Prohibits federal employees from accepting consular identification cards. Currently many cities,

counties and law enforcement agencies accept consular identification cards as valid forms of identification for opening bank accounts, investigating crime and otherwise proving identity.

- Subjects all individuals who entered without inspection and have been here less than 5 years to removal from the country and bars future entry without access to any review of that determination.
- Weakens the availability of basic due process protections for non-citizens and asylum seekers, including raising the burden of proof for claims under the Convention Against Torture.
- Makes individuals who enter the U.S. on a valid visa that is subsequently revoked by the State Department subject to removal from the country without a review of that decision. Thus, an individual whose visa is erroneously revoked would be removable from the U.S. without the opportunity to challenge the basis for the removal.
- Bars Federal agencies from accepting driver's licenses or other ID cards issued by a state unless certain overly burdensome requirements are satisfied. These requirements could grind to a halt the issuance of driver's licenses nationwide.

The House and Senate conferees did not succeed before the November 2 elections in resolving differences between the two bills. They are now working to determine if they can agree on a measure for passage during the lame duck session. Any legislation that they decide upon has the potential to profoundly impact our immigration system by initiating

changes in diverse areas that include border security and entry-exit systems, identification security, travel to the United States, training, technology, and database capacity.

If agreement is reached, this measure, depending on its provisions, could hurt our security and make our immigration processes even more dysfunctional than they are today. In contrast, effective legislation would strengthen the U.S.'s intelligence capacity and create a multi-layered border with several tiers of protection to most effectively enhance security. Measures designed to enhance our security must include provisions that mandate sufficient funding, an adequate number of well-trained officers, reasonable deadlines, accurate databases, technology that is up to the task, and congressional oversight of implementation, along with prioritizing initiatives. Security measures must also respect our civil liberties, due process, and privacy protections as well as provide an immigration system that can deliver on its basic commitments. Our nation needs an immigration system that "shrinks the haystack" by reforming our immigration laws (by legalizing the status of those currently living and working in the U.S., reducing the long backlogs in family-based immigration, and creating worker programs that allow people to enter and leave the U.S. lawfully) and facilitating the entry of "trusted travelers" so we can better focus our resources on those who mean to do us harm.

As the 9/11 Commission stated, the "border and immigration system of the United States must remain a visible manifestation of our belief in freedom, democracy,

global economic growth, and the rule of law, yet serve equally well as a vital element of counterterrorism.” The United States must remain a nation that

welcomes people to its shores. Immigration is in our national interest, and a system that works is essential to our national and economic security. America is a

nation of immigrants; immigration remains central to who we are and helps to explain our success as a people and a country. ■