

IMMIGRATION REVIEW

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HIGHLIGHTS...

...Microsoft announced their intent to open facilities in Canada where immigration constraints are less severe.

...Lack of training at the Department of Labor last year produced erroneous denials of H2B visas.

...In China, the H-1B visa stamp may only be issued for a single entry, necessitating revisiting the U.S. Consulate during each trip abroad.

Comprehensive Immigration Reform—A Failure?

Earlier this summer, the news media covered the failure of the U.S. Congress to pass Comprehensive Immigration Reform (CIR). Stymied by Congress' failure to deal with illegal immigration, America's legal foreign-born workers were left with no immediate relief to a badly broken system.

The employment-based immigration system is in urgent need of repair. Interestingly many of the suggested fixes proposed under CIR were not very business friendly. While proposing a 'guest worker program' for low skill jobs, the proposed legislation did little to increase the number of college educated workers able to enter the United States and did not provide sufficient relief in the backlogs associated with Green Cards.

Had CIR become law, there would have been little impetus for additional reform and U.S. businesses needing high-tech or educated workers would have been extremely disappointed with that legislation.

In June and July of this year, the Department of State and the USCIS struggled over the availability of Permanent Resident visas. After a series of conflicting decisions and contradictory announcements, public pressure forced the USCIS to accept Adjustment of Status applications from thousands of applicants—many of whom had been waiting for years. This fiasco highlights the need for further employment-based immigration reform.

In the coming months, Congress needs to increase the number of available H-1B visas. All the fiscal 2008 H-1B visas were allocated in the first few hours of filing—six months prior to the beginning of the fiscal year!

Additionally, there is an urgent need to increase the number of Green Cards available for professional workers. Current waiting times in excess of five years damages American competitiveness. In July, responding to these issues, Microsoft announced their intent to open facilities in Canada where immigration constraints were less severe. It is clear that technology outsourcing will increase in direct proportion to the restrictiveness of our nation's legal immigration policies.

Contact your Congressional Representatives and your U.S. senators to express your company's need for increases in the number of H-1B and Permanent Resident visas. ☺



To H2B or not to H2B – That is the Question

You're probably asking yourself if it's worth the effort to file for your H-2B visas this coming year. If last year is any indication of what is to come, we understand your frustrations.

The Department of Labor (DOL) had more than their share of problems last year. Lack of training produced erroneous denials and needless or incorrect Requests for Evidence. But beware—things may be no better this coming year.

In May at the DOL 'stakeholders' meeting, officials indicated that they were planning further implementation of the changes that plagued 2007 filings. Ominous statements like "things that worked last year will no longer work" and "you will need to use our criteria to document your need" do not bode well for those seeking H-2B visas in fiscal year 2008.

While DOL asserts that training has improved, it's likely that historically successful H-2B filing methods may create denials this year. Previously successful filings may not conform to current DOL expectations.

We've invested significant effort in understanding the new DOL approval criteria. To date, we've been 100% successful in obtaining Labor Certification for clients filing in 2008. If you're tired of jumping through H-2B hoops, call ISS for help in getting the workers you need.



Travel and Potential Difficulties

It is a common misconception that travel outside the United States is forbidden as soon as an individual begins the Green Card application process. While the question of international travel can be very complicated, there are some simple principles that will provide guidance in most cases.

Let's examine the straightforward case of an employee who is currently on H-1B status, has a valid H-1B stamp in his passport, and begins the application process for Permanent Residence—a Green Card. Very briefly, the Green Card petition process is divided into three major steps: Labor Certification, USCIS Immigrant petition (I-140), and Adjustment of Status (I-485).

Since the employee has a valid H-1B stamp, he may safely travel internationally, subject to existing H-1B rules, throughout the Green Card process. Entering the United States on a valid H-1B is not adversely affected by having initiated your Green Card. In the case of some countries, China for example, the H-1B visa stamp may only be issued for a single entry, thus necessitating revisiting the U.S. Consulate during each trip abroad. Likewise, even if the visa stamp has been issued for multiple entries but has expired, visiting the Consulate is required and in many countries this can be a time consuming and challenging process.

Once the Adjustment of Status application, I-485, is filed, the applicant has a new option available. He may file for Advance Parole—essentially permission to travel and re-enter the United States as an "adjustee" rather than on the current H-1B. This eliminates the need for repeatedly renewing the H-1B visa and the unpopular trip to the U.S. Consulate. However, entering as an "adjustee" means the employee is technically no longer on H-1B status. Thus, if the Adjustment of Status petition is denied for any reason, the individual does not have a legal status in the United States. Nonetheless, the individual may apply for an EAD (Employment Authorization Document) and continued work authorization without an underlying H-1B or L visa. Note that failing to maintain a valid non-immigrant status may have adverse consequences for H-4 and L-2 dependents. For these reasons we often recommend that most foreign nationals maintain a valid non-immigrant status while seeking a Green Card.

Advance Parole documents usually afford at least three trips outside the United States and are valid for only one year.

Provided the employee maintains a valid non-immigrant H or L status, travel while processing a Green Card is not problematic. Complications may arise for certain other non-immigrant classifications. In all cases, since travel is often



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FROM THE LAWYER'S DESK

Kendra S. Kembel, Esq.

Q At what point in the Green Card process do I need to be married to include my spouse in my petition?

A As long as the marriage takes place prior to approval of your Green Card, a spouse should be able to immigrate as your derivative. The filing of your spouse's case, however, will be dependent upon visa availability. A derivative beneficiary maintains the same priority date as the principal applicant. Therefore, if the priority date remains current the spouse will be eligible to file for Adjustment of Status in the United States or for an Immigrant Visa at the Consulate. If, however, the priority date is retrogressed, the spouse will not be able to process his or her case until such time when a visa is available.

Q How many days before the beginning of my H-1B status may I enter the United States?

A An individual may enter the United States up to 10 calendar days prior to the start of the H-1B employment start date. If necessary, you may need to request the Consulate to issue your visa stamp with the appropriate date to ensure your timely travel to the U.S. within that timeframe.

Q When during the Green Card process may I change employers and 'port' my Green Card petition to my new employer?

A To ensure a successful change in employment during the Green Card process, the following three requirements should be met: 1) the I-485 Application to Adjust Status must remain pending for at least 180 days, 2) the I-140 Immigrant Petition should be approved, and 3) the new job must be in the same or similar occupational classification as the prior employment. If you port before meeting all of these requirements, you may jeopardize your ability to continue the Green Card process.

Q Will an arrest or other criminal charges adversely affect my immigration status?

A Depending on the nature of the charge, an arrest or criminal charges may have adverse consequences on your immigration status. Certain criminal activities can lead to a determination of being inadmissible or even removable from the United States. No matter how minor you may consider an offense, you should always inform your immigration attorney of all criminal charges brought against you to ensure you have disclosed all necessary items to the USCIS on your immigration forms. Even criminal charges that were dismissed and/or expunged from your record need to be disclosed. ☺



AN ARREST OR CRIMINAL CHARGES MAY HAVE AN ADVERSE CONSEQUENCE ON YOUR IMMIGRATION STATUS. EVEN CRIMINAL CHARGES THAT WERE DISMISSED AND/OR EXPUNGED FROM YOUR RECORD NEED TO BE DISCLOSED ON ALL IMMIGRATION FORMS.

Travel, continued from page 2.

confusing we encourage our clients to call and review your travel intentions whenever you have any questions.

Once you have your Green Card, you must demonstrate your intent to live in the United States on a permanent basis. Therefore, extended travel abroad is not advised without proper documentation. Overseas trips of less than six months duration are rarely problematic. However when a Green Card holder leaves the United States for between 6 and 12 months he may have to demonstrate that he has not abandoned his Green Card. Travel outside the United States for more than a year, without a pre-approved re-entry permit, will result in the presumption that you have abandoned your Green Card and entry to the United States may be denied. ☺

IMMIGRATION 101

As in most things, knowing the terminology is critical to understanding a subject. Employment-based immigration is no different. Perhaps 'decoding' some commonly used acronyms and terms will help remove some of the mystery.

ACWIA . . . American Competitiveness and Workforce Improvement Act.

AILA American Immigration Lawyers Association

AOS Adjustment of Status – the final step in the Green Card process

AP Advance Parole - the ability to travel while a Green Card is pending approval

CIS US Citizenship and Immigration Service (formerly known as the INS)

DOL US Department of Labor

DOS US Department of State

EAD Employment Authorization Document

EB-1 thru EB-5 Employment-Base preference categories designated EB-1 through EB-5 for Green Cards

LCA Labor Condition Application. DOL approval associated with the H-1B process. Not to be confused with LCP

LCP Labor Certification Petition. DOL approval associated with the Green Card process. Not to be confused with LCA

LPR Lawful Permanent Resident – Status of those having a Green Card

OPT Optional Practical Training. Up to one year of work authorization after completing higher education at a US university.

PERM Program Electronic Review Management. The electronic method of obtaining an approved LCP. This is the 1st step in the Green Card process.

PW Prevailing Wage. The approved minimum wage for a specific job in a specific region of the country.

SWA State Workforce Agency. Source for obtaining a PW determination and place a PERM job order.

*“Honestly, without
ISS’ assistance
I couldn't do this
job! Thanks so
much for all of
your help, advice,
and guidance!”*

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Even though Congress didn't pass Comprehensive Immigration Reform, there were still sweeping changes made to the immigration process by both the DOL and USCIS. These changes will have a significant affect on your organization. How can you know what impact this will have on you? How do you respond to your employees who still want green cards? How do you know what requirements you have as a U.S. employer? Attend one of our **FREE** Webinars and we'll answers those questions and more.

- **Solving the Immigration Puzzle** – Immigration 101: An HR guide for putting all the pieces together. *October 30, 2007*
- **Green Cards...Are they still a viable option for my foreign-born employees?**
Learn how new DOL regulations affect you and your employees. *November 6, 2007*

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