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BUSINESS IMMIGRATION GROUP

OBSERVER

DECEMBER 2004

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EMPLOYMENT BASED 3RD PREFERENCE CATEGORY TO RETROGRESS

The Department of State (DOS) has announced that on January 1, 2005, the Employment-Based 3rd Preference (EB3) category visa for foreign nationals from India, mainland China, and the Philippines will retrogress to January 1, 2002. The third preference category is set aside for skilled workers and professionals. Further retrogression may be possible in future months. Accordingly, any foreign nationals from the listed countries who have a priority date in the EB3 category after January 1, 2002 will not be able to file their final clearance for permanent residence (either Adjustment of Status or Consular Processing, the last step required to obtain permanent resident status, "green card") until their priority date becomes available. Greenberg Traurig is identifying clients in the EB3 category who are eligible to file the Adjustment of Status application now to ensure that applications are filed prior to the anticipated backlog commencing on January 1, 2005.

What does this mean? When applying for permanent residency each foreign national is assigned a "priority date" for their permanent residence application. For foreign nationals who applied for their green card through the labor certification process, the priority date is the date the labor certification was filed with the Department of Labor. For foreign nationals with advanced degrees that applied for permanent residence based upon a different employment based category that does not require labor certification, the priority date is the date of filing of the I-140 petition.

The priority date is the foreign national's "place" in the line of those applying for employment-based immigrant visas. This line moves forward according to the Department of State's calculation of how many of the allotted visas have been already used in that year. These dates can remain still or move backwards (retrogress) for certain nationals, typically nationals of China, India and the Philippines. Foreign nationals may complete the last step of the green card process only if the cut-off date published by the Department of State each month is "current" or is later than their priority date.

Immigrant visas are numerically limited by category and by country of chargeability (which is, in most cases, one's country of birth). The worldwide level for annual employment-based preference immigrants is set at 140,000. No more than 27% of the employment annual limit may be used in each of the first three quarters in the fiscal year. For years these dates have remained current for all employment based categories. However, due to high demand by immigrant visa applicants and as CIS has begun to address their backlog of cases, visa numbers are quickly being used up at the rate of 19,000 to 22,000 per month. As such, it is estimated that more than 27% of the annual limit will be reached in the first quarter of FY 2005. Accordingly, the State Department has implemented a retrogression of the cut off dates for the EB3 category in January 2005 -- but only for China, India and the Philippines chargeability areas. Since the demand for visa numbers cannot be met within the statutory limits, these countries are deemed to be oversubscribed and thus now limited.

The EB3 category is set aside for skilled workers and professionals. No retrogression is anticipated at this time for other employment-based categories. The State Department has a recorded message with visa cut-off dates which can be heard at (202) 663-1541. The current visa bulletin can also be accessed online at: http://travel.state.gov/visa/frvi_bulletincurrent.html.

So, can employees upgrade to a different category? No. Once a labor certification application has been filed, if it was filed in the EB3 category, the application cannot be upgraded to a higher category (such as second preference or EB2) after filing. It is important to remember that the categories are assigned based on the requirements of the employer for the position, NOT the degrees that the foreign national possesses. Thus, companies will need to ensure that applications are filed pursuant to company and industry standards and not driven by the requests of employees, especially in light of increased pressure resulting from these backlogs.

What does this mean for you? If you have specific questions about the processing of your case, please contact Greenberg Traurig's Business Immigration practice. We have also provided hypothetical examples below indicating when applicants are eligible for submitting and filing applications in the various stages of the immigrant visa process.

Example 1: Labor Certification Application filed, but remains pending. If your labor certification application has been filed but remains pending, you are not eligible for filing the immigrant petition or the final clearance. To obtain permanent residency in the United States, applicants have the two options for final clearance include either Adjustment of Status ("AOS") or Consular Processing ("CP"). Neither option is available until the labor certification application has been certified by the Department of Labor and an I-140 immigrant visa petition has been filed by the employer and approved by USCIS. Retrogression affects such cases only theoretically; such applicants are not able to make that final filing (AOS or CP) until the first two steps are approved anyway. If your priority date is after January 1, 2002 and you are a national of one of the affected countries, you might be delayed in receiving your permanent resident status later on when you reach the third and final stage of this process, visa retrogression will dictate when you are eligible to file the adjustment of status applications in the U.S., or consular process through a U.S. consulate abroad.

Example 2: Labor Certification Application certified; no I-140 immigrant petition yet filed. Applicants whose labor certification has been certified can submit the I-140 immigrant visa petition regardless of whether or not the priority date is current. Those whose priority dates are not current cannot move on however to the next and final step until their priority date is current. Those whose priority dates are current, however, can (and in many cases should) file AOS applications concurrently with the I-140 immigrant petition.

Example 3: Labor Certification Application Certified and I-140 Immigrant Visa Petition approved, but no AOS pending. If the labor certification application has been certified and immigrant visa petition has been approved, but the AOS has not been filed prior to the retrogression of visa numbers, the applicant is not eligible for filing the AOS until their priority date becomes current.

Example 4: I-140 Immigrant Visa Petition approved; AOS pending. If the I-140 immigrant visa petition has been approved and the AOS application is pending prior to the retrogression of visa numbers, the AOS application will remain pending but will not be processed until the priority date becomes current. Applicants will continue to be eligible for renewals of work authorization and travel permission while waiting for the AOS application to be resumed when the priority date becomes current. Please note, however, this could be problematic for applicants who file their adjustment of status while single but marry after the filing the adjustment application and if during the adjustment application their H or L status maxes-out or lapses. In this scenario, there is no underlying nonimmigrant derivative status for the new spouse to assume while waiting for the priority date to become current and to become eligible for filing the derivative adjustment application.

Example 5: I-140 Immigrant Visa Petition approved; Consular Processing desired. Only applicants whose labor certifications are certified, whose I-140 immigrant visa petitions approved, and whose priority dates are current are eligible to proceed to the final step of CP. If the priority date is not current applicants would need to wait for the priority date to become current before commencing the CP.

Visa retrogression is likely to impact not only the principal applicant, but also family members. The Child Status Protection Act offers some protection to aging-out children, for example, but its application is complex and each case must be analyzed on its own merits. In addition, the ability of after-acquired spouses to adjust status may be affected. Finally, this will have an impact on maintenance of nonimmigrant status before and after the filing of adjustment of status applications.

WHOA! HOW MUCH DOES THAT H-1B COST?

President Bush signed the Omnibus Appropriations Act for FY 2005, Pub. L. 108-447, on December 8, 2004. This is the bill which contains significant changes to the H-1B visa. Unfortunately for employers, the legislation mandates immediate increased fees (both a new security/fraud fee and the resurrection of the ACWIA training fee), as previously reported by GT. The United States Citizenship and Immigration Service (USCIS) implemented the training fee immediately for all H-1B petitions filed after December 8, 2004 for which the fee is applicable. (It is not applicable in certain situations, such as petitions filed by educational institutions and non-profit research institutions and second extensions.)

The $500 security fee will be implemented separately and will be effective as of March 8, 2005. The security fee will be required for L-1 petitions as well as H-1B petitions. The training fee amount varies depending upon the size of the employer. Specifically, if an employer has 26 or more employees, they will have to pay not only the $185 filing fee to USCIS, but the training fee of $1500. If they have 25 or fewer employees, the training fee is $750. The fee of $1000 for premium processing remains the same for those who opt for it.

Also as part of the Omnibus Appropriations Act for FY 2005, as previously reported by GT, the L-1 Visa Reform Act of 2004 which goes into effect on March 8, 2005, restricts L-1B specialized knowledge work-

ers from working at a worksite other than the petitioning employer's worksite without strict oversight by the petitioning employer. The act also revokes a provision that allows certain employers with a blanket L-1 approval to bring qualified workers into the U.S. after only six months of employment at a related entity abroad. Those employers with blanket petition will now only be permitted to bring L-1 employees who have a minimum of one-year of employment with a related entity outside the U.S. A new Fraud Prevention and Detection Fee of $500 for all L-1 petitions in addition to the $185 filing fee to USCIS was also implemented. The fee will need to be paid on all initial petitions, again, on and after March 8, 2005.

DOL MOVES TO CENTRALIZE ITS CASES — SO WHERE IS MINE?

As previously reported by GT, DOL is actively engaging the next steps in its plan to reduce backlogs and centralize the processing of all labor certifications. Under guidance which went to all of the State Workforce Security Agencies (SWAs) in early December, all unopened and unprocessed permanent labor certification cases are now being sent to the two Backlog Reduction Centers in Philadelphia and Dallas. These centers will then utilize a first-in, first-out system so that the oldest cases that were still unprocessed would be processed first, as close to date order as possible. In the fall DOL made assurances that the First in First Out system would be implemented by a disinterested third party contractor to assure a level playing field.

In the memorandum sent to the SWAs on December 3, 2004, details for shipping of these unprocessed cases were provided. The first of these shipments is to consist of those cases whose receipt dates are "prior to 2003" and are unopened and un-processed. These cases must be sent to the appropriate new backlog reduction centers (either Philadelphia or Dallas, divided general along geographic lines) before Dec. 31, 2004. The second shipment is to include all other cases that have not been opened or processed before January 1, 2005 and must be sent to the appropriate center before March 31.

As a practical matter, this means that, despite all the protections that are laid out in the memo for the shipment of the cases, it will be virtually impossible for the public to identify where their cases are at a given moment, and impossible to check on the status of individual cases until a new process is in place for doing so. While the Backlog Reduction Centers and the SWAs will know, it may not be possible to tell for some months to come where cases have been sent, and when they will be worked on. DOL has assured the affected population that processing times will continue to be posted to provide guidance and that employers will be contacted about their cases in a timely fashion.

U.S. VISIT UPDATE

As we reported in the GT Business Immigration Observer of March 2004, U.S. VISIT is an entry-exit system. It is being implemented by the U.S. Department of Homeland Security in conjunction with U.S. Customs and Border Protection and other agencies to increase security in the United States. The following is a brief update regarding this system.

Second phase of entry-exit system initiated

The first phase of U.S. VISIT involved the implementation of the entry-exit system at 115 airports and 14 seaports and included pilot exit programs at BWI, Chicago O'Hare and Miami International airports. The second phase of U.S. VISIT, now underway, includes the expansion of the entry-exit system to the 50 most highly trafficked land ports of entry by December 31, 2004. The land ports of entry include ports along the borders of California, Texas, New York, Arizona, Michigan, Maine, Vermont and Washington states. Although several models for the exit program are being tested, entry procedures remain the same.

Applicability of U.S. VISIT to more groups

Although countries participating in the Visa Waiver Program have been given an extension to develop biometric passports, Visa Waiver Program participants are now subject to U.S. VISIT and must carry machine-readable passports. Mexican citizens requiring visas to enter the U.S., or those using a Border Crossing Card to travel beyond the border zone or to stay longer than thirty days, are subject to U.S. VISIT. Canadian citizens, who are not visa exempt (such as those on E, K, or V visas) or who will have non-immigrant status longer than six months (such as TN applicants), are subject to U.S. VISIT. It is important to note that no Canadian citizen is exempt from the requirement that they be issued an I-94 upon entry.

What you should know about exit procedures

Exit programs will be expanded to Atlanta, Dallas/Ft. Worth, Denver, Detroit, Ft. Lauderdale, Newark, Philadelphia, Phoenix, San Francisco, San Juan-Puerto Rico, Seattle, and Los Angeles. At all ports with exit programs in place, foreign travelers must use exit stations to scan their visas and index fingers and have their photos taken. If an exit station is not yet available, there will be no penalty for failure to use exit procedures. Whether an exit station is available or not, all foreign travelers must surrender their Arrival/Departure record (I-94) upon departure. This record is used to update data and to determine overstays. If a determination is made that an individual either failed to comply with exit procedures (where an exit station exists) or failed to comply with immigration laws by overstaying their period of admission, the individual may, at a minimum, face difficulties obtaining admission in the future or, at most, be subject to removal for the U.S. and be barred from future entry.

What you need to know before your travel

Before you enter the U.S., prepare for a two to four-week wait prior to visa issuance as most American consulates do some degree of pre-screening. Upon arrival in the U.S., anticipate wait lines as individuals subject to U.S. VISIT have biometric data collected and await as that data is checked against various agency databases. Anticipate the issuance of an I-94 record with an indication of an expiration. Check the expiration date against their visa or petition approval notice and bring up any discrepancies, if necessary. Ask to speak with counsel or contact us directly while they are at the airport if problems arise.

Before you exit the U.S., be certain that you (and your dependents) have a valid visa to re-enter the U.S., if necessary. Be certain that each of you has a valid I-94 record (and not a record that might suggest an overstay). Please note that traveling while a change or extension of status is pending may prejudice your application. If you have any doubt about your status or have questions about visa renewal prior to departure, please contact us to discuss these issues before you finalize your travel arrangements. Next determine whether an exit station is at place at the airport from which the employee is departing. If one is in place, be certain to locate it and use the station before they depart.

DIVERSITY IMMIGRANT VISA PROGRAM (DV-2006)

Instructions Issued by the Department of State

The Diversity Immigrant Visa Program which is administered by the U.S. Department of State, makes available 50,000 permanent resident visas annually to individuals from countries with low rates of immigration to the United States. The visas are distributed among six geographic regions with the greater number awarded to regions with lower rates of immigration to the U.S. and none going to countries sending more than 50,000 immigrants to the U.S. in the past five years.

Natives of the following countries are not eligible for DV-2006: Canada, China (mainland-born), Colombia, Dominican Republic, Jamaica, Mexico, Pakistan, Philippines, Russia, South Korea, United Kingdom (except

Northern Ireland) and its dependent territories, and Vietnam. Persons born in Hong Kong, SAR, Macau and Taiwan are eligible.

Eligibility Requirements

An applicant must:

- Be a native of a country whose natives are eligible. In most cases this is determined by the applicant's place of birth. However, if an applicant was born in an ineligible country but his/her spouse was born in a country whose natives are eligible, such person can claim the spouse's country of birth provided both applicant and spouse enter the U.S. simultaneously. Additionally, if a person was born in a country whose

natives are ineligible, but neither of his/her parents was born there or resided there at the time of his/her birth, such person may claim nativity in one of the parents' country of birth, if it is a country whose natives qualify for the DV-2006 Program.

And either:

- Have a high school education or its equivalent. This means successful completion of a 12-year course of elementary and secondary education.

Or:

- Have two years of work experience within the past five years in an occupation requiring at least two years of training or experience to perform. The Department of Labor's O*Net OnLine database will be used to determine qualifying work experience.

How to Apply

The Department of State will only accept completed Electronic Diversity Visa (EDV) Entry Forms submitted electronically at www.dvlottery.state.gov during the registration period between 12:00 pm EST on November 5, 2004 and ending at 12:00 pm EST on January 7, 2005.

Only ONE entry for each applicant will be accepted regardless of who submitted the entry. Paper entries will not be accepted.

A digital photo of each applicant, his/her spouse, and children must be submitted online with the EVD Entry Form. The entry will be disqualified if all required photos are not submitted. The image can be produced either by taking a new digital photograph or by scanning a photographic print with a digital scanner. (Refer to attached photo instructions.)

An electronic photograph of each child under 21 years of age, including all natural children as well as all legally-adopted children and stepchildren (except a child who is married, or who is already a U.S. citizen or a Legal Permanent Resident) must be submitted with the EDV Entry Form, even if a child no longer resides with the applicant or is not intending to immigrate under the DV program. Failure to list all children and submit a digital photo or each child will disqualify the entry.

Applicants will be asked to submit the following information on the EDV Entry Form:

1. **Full Name** - Last/Family Name, First Name, Middle Name
2. **Date of Birth** - Day, Month, Year
3. **Gender** - Male or Female
4. **City/Town of Birth**
5. **Country of Birth** - The name of the country should be that which is currently in use for the applicant where the applicant was born.
6. **Applicant Photograph** - See Information on Photo Specifications.
7. **Mailing Address** - Address, City/Town, District/County/Province/State, Postal Code/Zip Code, Country
8. **Phone Number** (optional)
9. **E-Mail Address** (optional)
10. **Country of Eligibility if the Applicant's Native Country is Different from Country of Birth** - If the applicant is claiming nativity in a country other than his/her place of birth, this information must be indicated on the entry.
11. **Marital Status** - Unmarried, Married, Divorced, Widowed, Legally Separated
12. **Number of Children that are Unmarried and Under 21 Years of Age** - Except children that are either U.S. legal permanent residents or American citizens.
13. **Spouse Information** - Name, Date of Birth, Gender, City/Town of Birth, Country of Birth, Photograph.
14. **Children Information** - Name, Date of Birth, Gender, City/Town of Birth, Country of Birth, Photograph.

Note: *Entries must include the name, date and place of birth of the applicant's spouse and all natural children, as well as all legally-adopted children and stepchildren, who are unmarried and under the age of 21 (except children who are already U.S. citizens or Legal Permanent Residents), even if you are no longer legally married to the child's parent, and even if the spouse or child does not currently reside with you and/or will not immigrate with you. Note that married children and children over 21 years or older will not qualify for the diversity visa. Failure to list all children will result in your disqualification for the visa.*

Applicants may copy and paste the following link to their browser and enter "search" to access the DV-2006 application form or point the cursor to the link and hit Ctrl+Click. This application form is linked directly to the Department of State.

http://www.dvlottery.state.gov/application.aspx

Confirmation of Entry

Entries that have been successfully registered will receive electronic confirmation showing the applicant's name, date of birth, country of chargeability, and a date/time stamp. The applicant may print this confirmation for his/her records.

Selection Criteria

Applicants will be selected at random by computer from among all qualified entries.

Notification of Successful Applicants

Those selected will be notified by mail between May and July 2005 and will be provided further instructions, including information on fees connected with immigration to the U.S. Persons not selected will not receive any notification.

DV-2006 visas will be issued between October 1, 2005 and September 30, 2006. Processing of entries and issuance of immigrant visas to successful applicants and their eligible family members MUST occur by midnight on September 30, 2006. Under no circumstances can diversity visas be issued or adjustments approved after this date, nor can family members obtain diversity visas to follow to join the applicant in the U.S. after this date.

Additional Information

Interested individuals may contact Greenberg Traurig's Business Immigration Group or the U.S. Department of State Information line at (202) 331-7199. Applicants overseas may contact the nearest U.S. Embassy or Consulate for instructions. Information is also available at http://travel.state.gov.

WILL PERM BE DELIVERED BY SANTA FOR THE HOLIDAYS?

GT has reported that PERM has Cleared OMB and publication is likely by December 27, 2004. The Office of Management and Budget (OMB), which oversees regulatory policies for the Executive Branch, completed its review of the final PERM rule on Friday, December 10, 2004, and publication is imminent. This rule had been pending at the OMB since February 23, 2004. The rule has now been forwarded for publication in the Federal Register. It is anticipated that PERM will be effective 60 days from the date of publication in the Federal Register.

PERM is a Department of Labor initiative that is designed to fast-track qualified Applications for Alien Employment Certification, the first step to permanent residence through employment for many alien employees in the United States. The PERM program will drastically change the Labor Certification process by reducing current processing times for qualified applications, from as much as two to four years to as little as twenty one days. Greenberg Traurig has been actively involved in the PERM program since well before it was first proposed in regulation in May 2002. We will post further updates as information becomes available. The program endeavors to bring processing of applications under PERM more in line with real-life business practices and procedures.

After the PERM rule is released and prior to implementation, DOL will post information on its website explaining the new process. DOL also plans to hold four public education seminars on PERM in various locations across the country. GT attorneys have been participating in a DOL working group to review the DOL program. However, the actual contents of the PERM regulation are not known to the public and will not be until publication.

The State Workforce Agencies will continue to accept cases until the actual implementation date of PERM although most cases are already being shipped to backlog reduction centers. There are roughly 310,000 cases currently backlogged in the system. It may be possible to convert existing cases to the new PERM system enabling foreign nationals to keep their priority date. However, it is likely that DOL will require that the existing case meet the PERM advertising requirements. Any old cases that are not convertible will continue to be processed under the current system through the Backlog Reduction Centers.

Backlog Reduction

As discussed above, DOL has implemented centralized processing of two new Backlog Reduction Centers in Philadelphia and Dallas to help reduce the backlog of cases filed prior to the implementation of PERM. These centers already have received cases from the Philadelphia and Dallas regional offices, as well as San Francisco, and are about to receive more of them (see above).

It should be noted that the backlog reduction program will only apply to certain applications filed under the existing DOL program and will not apply to cases to be filed under the PERM program when it

becomes available. The Backlog Reduction Center ("BRC") will use the method of first-in, first-out regarding the scheduling of the transfers and the processing of cases. The Backlog Reduction Center will be sending letters to employers and attorneys of record (based on last address in the files) verifying that the case is now with the BRC and asking if they wish to continue with the case. In many cases, the time lag between filing and processing will mean an employer does not wish to continue with the case. Employers must note there will be a 45 day response time in which to reply. These letters will be going out over the next 30 days where the cases are already at the BRC, and on an ongoing basis thereafter.

The process of filing labor certification has always been quite complicated yet an integral part of employing and managing foreign nationals. GT will continue to partner with our clients in an effort to design programs and to maintain stability and strength within the workforce. Managing a successful labor certification program is part of such an effort. We anticipate that the PERM program will cut down on processing times but will bring about a whole new string of other issues including compliance, audits and procedural queries. Greenberg Traurig will continue to keep you updated on this and other matters while continuing to identify cost and time saving strategies for clients.

IMMIGRATION LAW SEMINAR SERIES

Greenberg Traurig's Business Immigration practice continues its tradition of providing complimentary presentations to companies on outbound immigration issues as well as discussions on money saving tax strategies for employees as well as employers. Our team provides information, guidance and assistance to our clients on visa matters relating to the international relocation of personnel to, and between, countries outside of the United States.

Senior human resource managers, executives, general counsel, and managers across industries are directly impacted by immigration and tax regulations, the government agencies administering the regulations, and employment enforcement audits. Join us for these seminars and learn how to strategize and improve your organization's understanding of global transfers and employment of foreign nationals. Please contact Dawn Lurie, conference organizer, at luried@gtlaw.com or Camilla Velasquez at velasquezc@gtlaw.com for more information.

NEED AN H-2B? HURRY UP OR YOU'LL BE TOO LATE

This week the USCIS announced that it received 61,747 H-2B petitions counting against the FY05 66,000 cap. It is important to keep in mind that in the past the USCIS has approved approximately 100,000 beneficiaries to fully utilize the 66,000 H-2B visa cap during a fiscal year. In FY04 the visas capped out in March 2004. It is expected that in FY05, a cut-off with exceptions similar to those in FY04 will be implemented. H-2B workers provide non-agricultural seasonal or temporary tasks essential to the U.S. economy. H-2B workers include those in the service industry (food, hotel, retail), specialized seasonal food production (shrimp, crab and salmon processors to name of few), sports team athletes, and those working in the tourism industry including summer amusement park workers and New England hotel staff, among others. Visas are only issued after a "mini labor certification" is completed with the DOL, establishing that there are no US workers willing or able to fill these positions. The H-2B visa program helps to keep jobs in the U.S., critical to many U.S. companies and in some small way alleviates specific shortages of essential worker employees.

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The Business Immigration Observer is published by Greenberg Traurig's Business Immigration practice. Dawn M. Lurie serves as the editor. The newsletter contains information concerning trends and recent developments in immigration law and legislation analyzed and reported by immigration law professionals.

The Observer serves as an invaluable resource to individuals, human resource managers and recruiters, and company executives for whom keeping up with the most current immigration information is a professional imperative.

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DECEMBER 2004 RESOURCES

December 2004 State Department Visa Bulletin Link:
http://travel.state.gov/visa_bulletin.html
Service Center Processing Times:
Vermont: http://www.gtlaw.com/practices/immigration/processing/cis/vermont.pdf
Texas: http://www.gtlaw.com/practices/immigration/processing/cis/texas.pdf
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