Baker Law Corporation

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BLC Immigration Connection

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USA Jobs Protection Act of 2003 Introduced in House and Senate

On July 24, the USA Jobs Protection Act of 2003, was introduced by Representative Nancy Johnson (D-CT) and Senator Chris Dodd (D-CT) in parallel bills, H.R. 2849 and S. 1452 respectively. If passed, these bills would substantially alter the L visa and H-1B visa programs. Specifically, the bills would make the following changes to the L1 and H1B programs:

L visa program:

· Require employers to file an attestation with the Department of Labor (DOL) stating the following:

- The L-1 employee will not perform duties at the worksite of another employer where there are indicia of an employment relationship.

- The L-1 employer will provide wages that are the greater of the actual wage or the prevailing wage.

- The employer did not displace U.S. workers for 180 days before or after the filing of the L-1 petition.

· Provide for an annual review of blanket petition procedures by DHS and DOL.

· Increase the work experience requirement with the foreign employer from one year to two years.

· Limit the duration of the L-1A visa to 5 years and the L-1B visa to three years.

· For L-1B petitions, require the employer to file an application stating that the employer has taken good faith steps to recruit U.S. workers for the position.

· Direct the DOL to impose a fee on employers for L-1 petitions.

H visa program:

· Strike the definition of H-1B dependent employer and makes H-1B dependent provisions applicable to all H-1B employers.

· Add the H-1B dependent provisions to the DOL attestation requirements, including:

- The employer did not displace an American worker 90 days before or after the filing of the visa petition.

- The employer will not place the H-1B at a third party worksite where there are indicia of an employment relationship unless there is not displacement of a U.S. worker at the worksite for 180 days before and after the H-1B visa holder is placed at the third party worksite.

· Make the $1000 fee permanent.

Study of the Act:

· Mandate that no later than one year after the enactment of the Act, the GAO will investigate the Act's implementation and impact and will make recommendations on changes to existing law.

We will provide additional information as it becomes available.

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PILOT PRECERTIFICATION PROGRAM ANNOUNCED BY BCIS

At the 2003 AILA Annual Conference in New Orleans, BCIS stated that they are thinking about implementing a pilot program to pre-certify certain employers on the ability to pay the wages indicated on I140 immigrant petitions. This is of particular importance to companies who file numerous I140 petitions as BCIS has recently raised this issue in "requests for evidence" on nearly all immigrant petitions. The pre-certification would eliminate the unnecessary delays in preparing a response to BCIS on this issue for each I140 petition filed. In addition, the pre-certification program may allow employers to become "pre-certified" for certain occupations for which they are requesting H1B classification for their employees, thus eliminating possible inquires from BCIS on each petition filed. This would have particular significance for employers who file multiple H1B petitions for the same occupational classification. The purpose of the program is to eliminate the unnecessary paperwork duplication for companies who file multiple petitions with BCIS. The pre-certification pilot program may start as early as September 2003.

We will update you as soon as we hear more on this proposal.

BCIS REDESIGNS THE U.S. REENTRY PERMIT AND REFUGEE TRAVEL DOCUMENT

On July 30, 2003, BCIS announced that they will begin issuing a new single passport-style travel document for Reentry Permits and Refugee Travel Documents. Development of the redesigned travel document is intended to reduce production time, improve customer service and strengthen the booklet's security features. Enhanced technologies, similar to those used in the production of the United States Passport, will be employed in printing the BCIS travel document to prevent counterfeiting, tampering and other fraudulent schemes. The new document will be produced at the BCIS Nebraska Service Center in Lincoln, Nebraska, where the two separate travel Booklets (Reentry Permit and Refugee Travel Document) are currently prepared.

A Reentry Permit allows a permanent resident of the U.S. to apply for admission back to the States following an extended trip abroad. A request for a permit must be filed prior to an individual's departure from the U.S., and is generally issued for 24 months.

A Refugee Travel Document may be issued to a person who is in the United States as a refugee pursuant to section 207 of the Immigration and Nationality Act (Act), as an asylee pursuant to section 208 of the Act, or as a permanent resident who received such status as a direct result of refugee or asylee status. A valid Refugee Travel Document will be accepted in lieu of any travel document which would otherwise be required from that individual under the Act.

The redesigned travel document will look similar to a United States Passport, with the exception of its new light green cover. The title, ``Travel Document Issued by the U.S. Department of Homeland Security, Bureau of Citizenship and Immigration Services," will appear on the front cover. The type of travel document issued will appear on the inside page of the front cover, showing either Form I-327, Permit to Reenter the United States, or Form I-571, Refugee Travel Document. *(Continued)*

(Travel Document - Continued)

Biographical information and a photograph of the permit applicant will appear inside the document. The remaining pages will look similar to the current Forms I-327 and I-571.

Once the appropriate travel document is produced, the Nebraska Service Center will mail it to the approved applicant according to his or her instructions. While an applicant must be physically present in the United States at the time of filing, the Nebraska Service Center may mail the travel document in care of a United States embassy or consulate or a BCIS overseas office, if the applicant requests such service at the time of filing.

MACHINE-READABLE PASSPORTS REQUIRED FOR VISA WAIVER INDIVIDUALS

On July 16, 2003, the U.S. Department of State released a statement mandating that starting on October 1, 2003, individuals entering the United States under the Visa Waiver Program will now be required to have a machine-readable passport. If individuals do not have a machine-readable passport or choose not to obtain one, they will now be required to obtain a visa from a U.S. Embassy or Consulate before coming to the United States. This requirement applies to both adults and children alike. This machine-readable requirement applies to all categories of passports: regular, official, or diplomatic.

According to the USA Patriot Act of 2001, immigration inspectors have the discretion to deny entry to any individuals who attempt to enter the United States on a visa-waiver basis without a machine-readable passport after October 1, 2003. The purpose of this requirement is to enhance security as the passports can be scanned at entry and exit points to verify the integrity of the passport data. In addition, machine-readable passports will allow for precise identification of individuals and enable faster processing of individuals at the ports of entry.

Generally, individuals participating in the Visa Waiver Program are permitted to enter the United States for general business or tourist purposes for a maximum of 90 days without needing a visa. However, this new requirement mandates the use of machine-readable passports after October 1, 2003 for a visa-free entry, otherwise a visa will be required. The 27 countries currently in the Visa Waiver Program and who are affected by this new machine-readable requirement are as follows: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

Should you require further information please do not hesitate to contact our office. Also, the Visa Waiver Requirement can be found at the Department of State Visa's website at :

http://travel.state.gov/vwp.html

LABOR CERTIFICATIONS

In light of the recent economic downturn, it has become increasingly difficult to get a labor certification approved by the Department of Labor (DOL). In essence, a labor certification is a determination that there is a shortage of U.S. workers who are available for the position in question. The DOL cannot make that determination if it believes that qualified applicants in the occupation have been laid off or are looking for work. As a result, the DOL is responding to Reduction in Recruitment (RIR) requests in several ways. Below is a summary of the different approaches the DOL is taking with regard to RIR requests. We have also included a "Pro and Con" list to help employers decide whether to file RIR or Non-RIR labor certifications.

What is a Notice of Findings?

A Notice of Findings (NOF) is issued by the DOL when they require additional information before they can issue a final determination on the case. Typically, NOF's address such issues as employer lay-offs. A NOF affords the employer an opportunity to cure any deficiencies found in the application. If the response submitted is acceptable to the DOL, the application will be approved. If the response is not acceptable to the DOL, then the application will be denied and the employer will have to wait six months before refilling a new application.

What is an Automatic Remand?

In some cases, the DOL simply denies the RIR request and automatically sends the case back to the SESA (State Employment Service Agency) for regular, Non-RIR processing. This will require the employer to conduct further recruitment that will consist of three days of advertising in the appropriate newspaper and a 30-day job listing on the EDD placement system. These cases that are sent to the EDD for "slow track" processing will be placed in the queue for processing according to the date on which they were originally filed (not the date they are remanded by the DOL).

What is a "60 Day" Letter?

In other cases, the DOL sends to the employer a notice known as a "60 Day Letter." This letter affords the employer three options: (1) withdraw the application; (2) request that the application be remanded to the appropriate SESA for regular processing (i.e., supervised recruitment); or (3) place an additional advertisement in the newspaper and report on the results. If the employer does not respond within 60 days, the DOL will remand the case to the local SESA.

Please be advised that if the employer chooses to run an additional ad, it may be difficult to disqualify all the candidates. The DOL is aware of the availability of US workers in the high-tech industry and they will deny the application if they believe there are qualified applicants who respond to the ad. Thus, if the employer receives resumes from candidates who appear to be qualified for the position, it may be wise to simply ask the DOL to remand the case for regular, Non-RIR processing.

Once the case is remanded to the SESA, it may take between 6-12 months before the supervised recruitment begins. There is a very good chance that by then the economy will improve, and that the recruitment will reflect a shortage of qualified workers.

SHOULD NEW LABOR CERTIFICATIONS BE FILED AS RIR OR NON-RIR ?

RIR PROS:

· Traditionally known as the "fast track"
· Employer does own recruiting and screening
· Employer can choose methods of recruitment

RIR CONS:

· Current backlogs in processing times (1-2 years)
· Employer must recruit for six months prior to filing application
· Advertising can be costly
· Advertising in current economic downturn will result in many applicants
· Must disqualify all candidates for lawful, job-related reasons

(*Labor Certifications - Continued)*

NON-RIR PROS:

- No advertising required prior to filing so can file immediately
- Employer will not be asked to advertise until 12 to 18 months down the road, so economy could improve
- Employer will only need to run ad for 3 consecutive days
- Employee will qualify for 7th year extension of H-1B status once application is on file for 365 days

NON-RIR CONS:

- Current processing times 3-4 years
- SESA screens applicants

Regardless of which labor certification process you choose RIR or NON-RIR you will have to demonstrate to the DOL that there is a shortage of U.S. workers in the occupation and geographical area to be certified. In these economic times, it is unlikely you will find a shortage of U.S. workers in any industry. Despite this, we continue to see approvals in certain RIR cases. Therefore, we strongly recommend speaking with an attorney to help you strategize and determine the best option to suit the needs of you and your employer.

UPDATE ON RIR PROCESSING IN CALIFORNIA

The American Immigration Lawyers Association received information from Mr. Bill Carlson, Chief of the Division of Foreign Labor Certification, U.S. Department of Labor, that he expects to provide DOL Region VI (San Francisco DOL) with guidance on dealing with high-tech RIR or "Reduction In Recruitment" labor certifications by the end of August 2003. Until recently, Region VI had been denying the RIR portion of application for high-tech positions and was returning applications filed in late 2001 to the State level for continued processing under "supervised recruitment" (slow track labor certification processing). After meeting with a DOL Liaison working group two weeks ago, Mr. Carlson agreed to consider developing a new policy for handling these cases. Region VI has stopped remanding RIRs while the national office considers the formulation of a new policy.

Mr. Carlson plans to travel back to California in mid-August to meet again with the DOL Liaison working group and with Region VI officials. After this meeting, Mr. Carlson plans to provide final guidance with respect to the adjudication of high-tech reduction in recruitment labor certification applications. We will provide additional information as it becomes available.

BLC SEMINAR SCHEDULE

BLC is very pleased to be able to offer an in-house immigration seminar series for human resources professionals. Please visit our website for upcoming events.

Web Site Links

BCIS Service Centers
http://www.bakerlawcorp.com/news/jit.html

Visa Bulletin
http://www.bakerlawcorp.com/news/visa.html

Immigration Links
http://www.bakerlawcorp.com/services/immlinks.html

Department of Labor
http://www.ows.doleta.gov/foreign/times.asp

We hope this bi-monthly newsletter will compliment our web site and keep you informed of the latest immigration news. BLC Immigration Connection will be published and distributed monthly via e-mail. Your comments and suggestions regarding topics you would like to see covered are welcomed. Please e-mail us at strategic.alliances@bakerlawcorp.com with any suggestions you may have.

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