

Siskind's Immigration Bulletin
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1. Openers

Dear Readers:

We planned to run our usual newsletter this week and then suddenly we had several major stories out of Congress to cover. So we've chucked our usual format and are just reporting this week on three major news items - the passage of a major J-1 physician bill, the end of the 9/11 bill and the passage of a an H-1B/L-1 bill that will dramatically change both programs. Next week we'll return to our normal format.

As always, we remind readers that we're lawyers who make our living representing immigration clients and employers seeking to comply with immigration laws. We would love

to discuss becoming your law firm. Just go to <http://www.visalaw.com/intake.html> to request an appointment or call us at 800-748-3819 or 901-682-6455.

Regards,

Greg Siskind

2. Congress Passes Major J-1 Physician Bill

This afternoon, the US House of Representatives unanimously approved S. 2302, a bill which extends the Conrad 30 J-1 physician waiver program. The Senate has already passed the bill and the legislation now goes to President Bush for an expected signature. The program allows each state in the US to sponsor up to 30 foreign physicians per year who train in the US to remain in this country. J-1 physicians are normally required to return to their home countries for two years following their training. Under the Conrad program, states can sponsor physicians for a waiver of this requirement in exchange for the physician agreeing to work three years in a medically underserved area. The program began its sunset on June 1, 2004. S.2302 will extend this date by two more years.

The bill also makes several significant changes to other aspects of the state and federal J-1 waiver programs:

- State and Federal agency waiver applicants will be exempt from the H-1B numerical cap.
- Each state will be able to have the flexibility to use five waivers per year for applicants taking jobs outside of federally designated medical shortage areas IF they can demonstrate that they will actually be serving people who live in shortage areas.
- Both State and Federal agencies can sponsor specialists (only state agencies and the Veterans Administration can do so now).

The bill will pave the way for many more specialists to work around the country. The Delta Regional Authority is expected to be the first Federal agency to take advantage of the new law and the agency intends to begin sponsoring specialist cases as soon as President Bush signs the legislation. The expansion of the H-1B cap exemption to federal waivers is also important since the H-1B cap has been reached and Federal waiver programs have been hampered by not being able to offer physicians the ability to actually work in their sponsoring communities.

3. US Congress Fails 9/11 Intelligence Reform Legislation

A bipartisan effort to reform the nation's intelligence community after the terrorist attacks of September 11, 2001, failed this weekend. Lawmakers were sent home Saturday without voting on the legislation, a move that has been criticized by many republicans and democrats alike.

Under the proposed legislation, the White House and the bipartisan 9/11 commission would have created one position to oversee the CIA and several other nonmilitary spy agencies. A new national counterterrorism center would coordinate the fight against terrorism.

The White House is urging Congress to keep working on the legislation. Speaker Dennis Hastert left open the possibility of calling lawmakers back in session early next month.

Siskind's Immigration Bulletin ran a story outlining the immigration provisions of the legislation. It can be accessed at the following link:
<http://www.visalaw.com/04nov3/13nov304.html>.

4. Congress Passes H-1B and L-1 Visa Reform Law; More H-1B Visas on the Way

The US Congress passed legislation making substantial changes to the H-1B and L-1 visa programs as part of a massive budget bill approved by the legislative branch on Saturday. The budget bill is a "must pass" piece of legislation that will keep the government running for the current fiscal year. The Senate passed the bill by a vote of 65 to 30 and the House passed it by a vote of 344 to 51. President Bush is expected to sign the bill when it reaches his desk in the next few days. Several provisions in the bill will take effect immediately upon the President signing the bill.

The most notable change on the H-1B front that will be coming is the exemption of up to 20,000 graduates of US graduate degree programs each year from the H-1B cap. Other changes that will come will be the re-emergence of the worker retraining fee that applied in H-1B cases until last year. That fee is going up to \$1500, though small businesses are will only have to pay \$750. And all H-1B applications will now have to include an additional \$500 fee allocated for fraud prevention and detection. All employers, including those exempt from the worker retraining fee, will have to pay this new fee.

For L-1 visas, the controversial practice of L-1 employees being subcontracted to third party businesses is being outlawed. And the law which allows L-1 blanker petition beneficiaries to only work for six months is being changed back to the old law that required one year of continuous employment.

Below is a section by section summary of new legislation:

SECTION 1. SHORT TITLE

The bill's short title is "L-1 Visa and H-1B Visa Reform Act".

Subtitle A—L-1 Visa Reform

SECTION 11. SHORT TITLE.

This subtitle may be cited as the "L-1 Visa (Intracompany Transferee) Reform Act of 2004".

SECTION 12. NONIMMIGRANT L-1 VISA CATEGORY.

L-1 visa holders may not be subcontracted to third party employers. The new section requires employees to be stationed primarily at the work site of the petitioning employer if the worker will be "controlled and supervised principally by such unaffiliated employer" and "the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary."

SECTION 13. REQUIREMENT FOR PRIOR CONTINUOUS EMPLOYMENT FOR CERTAIN INTRACOMPANY TRANSFEREES.

This provision does away with the lesser requirement in L-1 blanket petition cases allowing employees with six months continuous employment abroad to receive L-1 status. All L-1 blanket applicants must meet the one year requirement applicable to all other L-1 applicants. The new section only applies to new L-1 petitions and not to people already in the US in L-1 status.

SECTION 14. MAINTENANCE OF STATISTICS BY THE DEPARTMENT OF HOMELAND SECURITY.

This section requires the Department of Homeland Security to maintain statistics on L-1B applications and those L-1B applications based on work primarily at offsite locations.

SECTION 15. INSPECTOR GENERAL REPORT ON L VISA PROGRAM.

The Inspector General of the Department of Homeland Security will issue a report to the House and Senate Judiciary Committees on the "vulnerabilities and potential abuses" in the L-1 visa program.

SECTION 16. ESTABLISHMENT OF TASK FORCE.

Within six months after the submission of the Inspector General report noted in Section 15, the Department of Homeland Security, the Department of Justice and the Department of State shall establish an "L Visa Interagency Task Force that report to the House and Senate Judiciary Committees on the efforts to implement recommendations of the Inspector General's report and any other issues the Task Force chooses to raise with respect to the L-1 program.

SECTION 17. EFFECTIVE DATE.

The changes in the L-1 program noted in this Subtitle will take effect 180 days after the date of this bill becoming law.

Subtitle B—H-1B Visa Reform

SECTION 21. SHORT TITLE.

This subtitle title is the “H-1B Visa Reform Act of 2004”.

SECTION 22. TEMPORARY WORKER PROVISIONS.

(a) This section reinstates and makes permanent the H-1B non-displacement attestation requirements that were in effect until October 1, 2003.

(b) The previously applicable worker retraining fee is reinstated and will increase from \$1000 to \$1500. Employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries) only need to pay \$750. Previously exempt employers will continue to be exempt from the fee.

SECTION 23. H-1B PREVAILING WAGE LEVEL.

The current law allowing employers to pay 95% of the prevailing wage is changed and employers must now pay 100% of the prevailing wage or higher. For governmental wage surveys, four wage levels will be used instead of the current two wage levels. Wage levels are based on experience, education and the level of supervision.

SECTION 24. DEPARTMENT OF LABOR INVESTIGATIVE AUTHORITIES.

This section reinstates and makes permanent the provisions in the law that expired on October 1, 2003 that allowed the Department of Labor to investigate any employer that the DOL reasonably believes is engaged in fraud and abuse. The Secretary of Labor must personally certify that reasonable cause exists and shall approve the commencement of the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer.

The Secretary of Labor may conduct an investigation when it receives “specific credible information” from a source who is likely to have knowledge of an employer’s practices or employment conditions or an employer’s compliance with the employer’s labor condition application. The information must be submitted within a year of the underlying activity that is the subject of the information. The Secretary of Labor may keep the source’s identity secret. The Secretary of Labor must set up a system for people wishing to complain under this provision. And investigations under this section may not originate from a source who is an officer or employee of the Department of Labor or who was lawfully obtained by the Labor Department in the course of conducting another investigation under this section. Also, information received by an employer as part of an H-1B application is not considered information received for purposes of triggering an investigation under this section.

If an employer is to be investigated under this section, the Labor Department must notify the employer before the actual investigation begins in order to permit the employer to respond to the allegations before an investigation is commenced. The DOL can get around this requirement if such a notice would interfere with an effort to secure compliance by the employer with the requirements of the section. There is no judicial review of such a determination by the Secretary of Labor.

An investigation under this section may be conducted for a period of up to 60 days. If the Labor Department finds that a "reasonable basis exists to make a finding that the employer has committed a willful failure to meet" the requirements of this section or has engaged in a "pattern or practice of failures" to meet the requirements of this section, the Department of Labor must provide an opportunity for a hearing within 120 days after this determination. A finding must be issued within 120 days after the date of this hearing.

An employer who is found to have complied with the requirements except for technical or procedural failures will be deemed to have complied with the requirements of the section if there was a "good faith" effort to comply with the rules. But this good faith exception will not apply if the Labor Department or another agency previously explained the failure to the employer and the problem was ignored or the employer has been given 10 days or more to correct the problem and has failed to do so.

Employers found to have violated requirements to pay the required wage shall not be assessed penalties if the employer can show that the wage was calculated using recognized industry standards and practices.

The Secretary of Labor will be required to issue a report each year prior to January 31st on the investigations conducted under this section.

SECTION 25. EXEMPTIONS FROM THE H-1B NUMERICAL LIMITATION.

Up to 20,000 new H-1B slots will be made available to graduates of US masters degree (or higher) programs. The statute does not specify whether USCIS will pull approved applicants out of the already approved 65,000 cases for 2005 or will simply open the door for new applications under this new section.

The Department of Homeland Security will also have to maintain statistics on the country of origin, educational level, occupation and salary of each applicant approved for an H-1B under INA Section 214(g)(5). That data will be included in the annual report to Congress required by the American Competitiveness and Workforce Improvement Act of 1998.

SECTION 26. FRAUD PREVENTION AND DETECTION FEE.

The Department of Homeland Security is now required to charge a \$500 fraud prevention and detection fee. This is on top of the normal processing fee, the worker retraining fund fee and the premium processing fee (if faster processing is chosen). This fee applies in all new H-1B **and L-1 cases** as well as applications to change employers. This fee only applies to the principal applicant and not applications for spouses and children accompanying or following to join the principal applicant.

The money will go toward the creation of a new H-1B and L Fraud Prevention and Detection Account. The money will be split by the State Department, the Department of Homeland Security and the Department of Labor and the agencies will consult with one another in using the funds.

The provisions in this section take effect on the date of the enactment of the law and the fees imposed shall apply to applications filed on or after the date that is 90 days after the date of the enactment of the law.

SECTION 27. CHANGE OF FEE FORMULA

This section changes the fee formula used to distribute H-1B worker retraining fund fees. Training grant programs, scholarships and processing will receive higher amounts than before. The money will be distributed as follows:

Job training grants – from 55% to 50%
Scholarships – from 22% to 30%
K-12 programs – from 15% to 10%
DHS processing – from 4% to 5%
DOL processing – from 5% to 5%

SECTION 28. GRANTS FOR JOB TRAINING FOR EMPLOYMENT IN HIGH GROWTH INDUSTRIES

This section amends a provision in the American Competitiveness and Workforce Improvement Act of 1998 and reauthorizes the Department of Labor to provide job training and related activities for workers to assist them in finding jobs in areas that are expected to experience significant growth.

SECTION 29. NATIONAL SCIENCE FOUNDATION LOW-INCOME SCHOLARSHIP PROGRAM

This section allows the NSF to now award scholarships to a broader range of students and increases scholarships from \$3125 to \$10,000 and allows up to 50% to be used for undergraduate programs for curriculum development, professional and workforce development and to advance technological education.

SECTION 30. EFFECTIVE DATES

The amendments in the H-1B subtitle shall take effect 90 days after the date of enactment except for the following sections that take effect immediately:

22(b) - the worker retraining fee
26(a) - the fraud prevention and detection account (though the fee does not go into effect until 90 days after the law is signed)
27 – the change of fee formula.