

Morgan Lewis

C O U N S E L O R S A T L A W

LABOR AND EMPLOYMENT LAW SEMINAR

“The Good, the Bad and the Ugly”: The Upcoming Year in Immigration Law and Policy

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Recent Developments—Severe Impact on Business Immigration




- H-1B Cap reached in mid-August.
- Severe unavailability of immigrant visas in employment-based categories.
- L-1 Visa reform.

Few Positive Developments in Immigration



- Generous interpretive memo on provisions of American Competitiveness in the 21st Century Act ("AC-21").
- Memo interpreting L-1 reform law is not as restrictive as expected.
- PERM labor certification system has improved greatly since implementation in March 2005.
- E-3 Visa introduced for Australian nationals.

Upcoming Legislative and Regulatory Developments 2005-2006



- Possible new \$1500 filing fee for L Visas, other restrictions to the L category.
- Legislative proposals for comprehensive immigration reform.
- DOL proposal to eliminate labor certification substitution.
- USCIS to issue AC-21 regulations.

H-1B Cap

- 65,000 H-1Bs available to for-profit organizations each FY.
- Allotment includes a “set aside” for Chilean and Singaporean nationals.
- Can begin to apply in April for next FY’s allotment.
- Apply April 1; work may begin October 1.
- Each year, cap is met earlier and earlier.

H-1B Cap

- Additional 20,000 visas available each FY for graduates of U.S. advanced-degree programs.
- Cap does not impact
 - Extensions.
 - H-to-H transfers, where both entities are cap-subject.
 - Foreign nationals employed at universities, nonprofit or government research organizations.

Example



- Shilpa, an F-1 student from India, graduates on May 1, 2006 from MIT with a B.S. degree in computer science.
- Shilpa has practical training and an EAD valid until May 1, 2007.
- She has heard that practical trainees do not have to pay FICA taxes, and wants to work for you on her EAD. She can always change to H-1B later.
- H-1B numbers for FY 2006 are still available.
- What Do You Do?

Alternatives to H?

- J Visas for business trainees
- O Visas for the “best and the brightest”
- TN Visas for Mexican and Canadian citizens
- E-3 Visas for Australians
- Employment abroad

Employment-Based Visa Retrogression



- 140,000 immigrant visas available each FY.
- Availability not a problem in recent years, in part because of green card processing delays.
- State Department produces visa bulletin monthly, showing immigrant visa availability in various categories.

Key Concepts

- Priority Dates
- Cut-Off Dates
- The Three Employment-Based Preference Categories (“EBs”)
- Chargeability

Employment-Based Visa Retrogression



- Priority date system now becomes crucial.
- Severe impact worldwide on foreign nationals sponsored for jobs requiring bachelor's degrees.
- Severe impact on nationals of India and China in jobs requiring bachelor's degrees and master's degrees.
- Retrogression also impacts nationals of India and China in First Employment-Based Preference Category (including multinational managers and “extraordinary ability” foreign nationals.)

The Situation Today

Category	China	India	Philippines	Mexico	All Other Areas
EB1	1Jan2000	1Aug2002	current	current	current
EB2	1May2000	1Nov1999	current	current	current
EB3	1May2000	1Jan1998	1Mar2001	1Jan2001	1Mar2001

What Does This Mean?

- Priority date must be current in order to complete green card process.
 - Labor certification can and should be filed.
 - Immigrant Visa Petition can and should be filed.
 - AOS or Consular Processing cannot take place until PD is current.
- Indian national in a job requiring a master's degree filing a labor certification now will have a six-year wait for a green card.

Example



- You have three Chinese employees, Yong, Bai and Ming.
- Yong has an Outstanding Researcher petition filed on June 1, 2003, that has been approved. His AOS application is still pending, as is that of his wife, which was filed with his.
- Bai has an RIR labor certification application that was filed on April 1, 2000, and is pending at one of the backlog elimination centers. The application required a master's degree, which Bai has.
- Ming had an RIR labor certification application requiring only a bachelor's degree filed on his behalf on May 1, 2001. This was certified, and his I-140 has been filed. His AOS application took a while to be filed because Ming could not find a copy of his Chinese birth certificate. This was finally found on September 30, 2005, and his AOS application was filed on October 1.
- All three want to know how the retrogression will affect them.

Dealing with the Backlog

- Keeping Your Employee Here
- Cross-Chargeability
- Priority Date Retention
- Grinning and Bearing it

EB Retrogression: The Impact on Your Business



- Pressure to file green card cases sooner rather than later to obtain earliest PD possible.
- Pressure to file in EB2 category.
- Pressure to upgrade or convert currently pending labor certification cases to PERM cases.
- May be beneficial for employee retention.

On the other hand . . .

“AC-21” — A Saving Grace

- AC-21 provides for extensions of H-1B status beyond the six-year limit
 - Where the green card process has been initiated 365 days before the end of the sixth year, either through labor certification filing or I-140 filing

Under this provision, extensions are available in one-year increments

“AC-21”-A Saving Grace

- AC-21 provides for extensions of H-1B status beyond the six-year limit
 - Where the employee’s immigrant visa petition (I-140) is approved but the employee cannot complete the green card process due to immigrant visa unavailability or “retrogression.”

Under this provision, extensions are available in three-year increments.

Example



- You have two Indian employees, Venkat and Raj.
- Both have master's degrees; Venkat's position requires one, Raj's does not.
- Your company filed RIR labor certification applications for them on October 15, 1999.
- Both labor certification applications have been certified; Venkat's I-140 has been approved, Raj's has not. Neither has filed an AOS application.
- Both Venkat and Raj are nearing their sixth year in H-1B status, and fear that they may have to leave the U.S. because their AOS applications are not on file.
- What Do You Tell Them?

“Adjustment Portability” under AC-21

- An employee can “port” to a different employer and maintain a green card application sponsored by a prior employer under certain conditions
 - Immigrant visa petition (I-140) approved or approvable at filing
 - 180 days since filing of adjustment
 - Same or similar occupation

USCIS Memo on AC-21 – May '05

- Guidance memo while regulations are being drafted.
- Allows adjustment portability if immigrant visa petition approved OR approvable when filed.

USCIS Memo on AC-21 — May 05

- Confirms that adjustment portability is available
 - Even if foreign national moves to different geographic region.
 - Where foreign national moves to self-employment as long as it is “same or similar.”
 - Where foreign national was a multinational manager.

AC-21 — Key Concepts

- Allows H-1B workers to remain in status while waiting for long-delayed labor certifications or backlogged immigrant visas.
- No similar coverage for L Visa holders.
- Adjustment portability allows for a fair degree of employee mobility in the final stages of the green card process.

L Visa Reform



- L-1 Reform Act of 2004 was passed in response to perceived abuses of the L Visa by companies engaged in staff augmentation.
- Changed period of service abroad required under a “Blanket L” back to one year, from six months (does not impact L holders previously admitted under blanket).
- Restricted ability of L employer to place workers at third-party sites.
- L employer must have control of employees.
- L employer’s specialized knowledge must be used.

USCIS Memo on L-1 Reform

- Fair interpretation of the client-site rules
- Client-site worker only ineligible for L-1B if stationed “primarily” at client site and
 - controlled and supervised principally by the client, not the employer
 - Work is essentially to provide labor for hire, not pertaining to petitioning employer’s specialized knowledge

PERM Implementation



- PERM introduced March 28, 2005.
- New online system for submitting labor certification applications.
- PERM also sets forth very clear, bright-line rules for recruiting and testing the labor market prior to filing.
- Labor certification cases filed prior to March 28 have all been transferred to backlog elimination centers.

PERM Implementation



- PERM requires employer to take certain steps prior to filing labor certification:
 - Obtain prevailing wage determination
 - Place job order in State Workforce Agency Job Bank
 - Place two Sunday ads for any professional occupation
 - Post job opportunity in-house, both on paper and electronically
 - Undertake three other forms of recruitment, chosen from a menu of recruitment options

PERM Implementation

- Recruitment must be completed in the six-month period prior to filing.
- U.S. applicants cannot be rejected if they can meet the requirements through a reasonable period of on-the-job training.
- Once PERM case is filed, it can take up to sixty days for a response.
- Despite early computer glitches, most cases are currently being approved very smoothly.

On the Legislative Horizon . . .

- Senate reconciliation proposal with some generous “fixes” for business immigration
 - Additional immigrant visa numbers to alleviate the backlog.
 - Ability to file adjustment, even when priority date not current, for an additional \$500.
 - Recapture of all unused H-1Bs since 1990
 - approximately 300,000.

Proposals for Comprehensive Immigration Reform



- McCain-Kennedy bill
 - Increased border security
 - New Temporary Worker program for less-skilled workers — H-5A
 - New “earned adjustment” program-H-5B
 - Increase in number of family-based and employment-based immigrant visas
 - Companion bill in House is Kolbe-Flake bill

AgJobs



- Addresses need for foreign agricultural workers.
- Affords legal temporary status to those currently in the U.S. unlawfully, performing agricultural labor.
- Enjoys wide bipartisan support.

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