

The Changing World of Immigration

by Christopher Thomas



The world of immigration law continues to evolve at an unprecedented pace. Since September 11, 2001, immigration practitioners have witnessed major procedural and substantive modifications to the law on nearly a monthly (sometimes daily) basis. This article will highlight a few of those changes.

I. Dissolution of INS/Creation of DHS

The events of September 11 focused the country's attention on the shortcomings of the Immigration and Naturalization Service (INS). The INS failed to track some of the terrorists who entered the U.S. on student visas but never showed up at their selected schools. Six months later, to add to the controversy, the INS mailed approval notices for two of the deceased terrorists that would have allowed them to extend their visa statuses and continue their flight training. These failures, along with a multitude of other problems, led to a universal call for change.

In response, following several months of debate, President Bush signed into law The Homeland Security Act of 2002 (PL 107-296), which led to the creation of the Department of Homeland Security (DHS). The INS was thus disbanded and its functions were merged into three new divisions within DHS: the United States Immigration and Customs Enforcement (ICE), the United States Customs and Border Protection (CBP), and the United States Citizenship and Immigration Services (CIS).

II. Increased Scrutiny and Policy Changes

In April 2002, just after four Pakistani crewman had unlawfully obtained visa waivers from a border officer and disappeared into Virginia, the Commissioner of the former INS testified before Congress that he had instituted a "zero-tolerance policy with regard to INS employees who failed to abide by headquarters-issued policy and field guidance." This directive understandably made immigration officers nervous. Consequently, many began to send Requests for Evidence (RFEs), a device by which they sought to verify, and often re-verify, employers' assertions in pending visa petitions and to ensure that cases were properly adjudicated. As expected, such requests led to longer processing times and backlogs at the service centers, leading the CIS to rescind the memorandum eventually and to permit its officers to begin to exercise at least some practical discretion.

Despite the rescission of the "zero tolerance" policy, the negative, almost hostile, culture continued at CIS service centers. In light of the growing backlogs, the CIS decided to formulate yet another novel policy. Under this policy, rather than send RFEs to clarify issues in cases, Associate Director William Yates issued a policy memorandum that authorized CIS officers to deny petitions without RFEs. Though Mr. Yates attempted to limit the situations in which such denials could occur, many CIS officers

seemed to be incapable of interpreting the instructions in the memorandum. As a foreseeable consequence, petitions that clearly met the requisite legal standards began to be denied outright, leading to a flood of angry appeals and unprecedented backlogs at the appellate unit at CIS.

Eventually, with the realization that the “denial without RFE” memorandum was also a clear failure (and, incidentally, directly contrary to published regulations), Mr. Yates issued a new policy memorandum, rescinding the earlier memorandum and seeking to reestablish compliance with previously published immigration law. In this most recent policy memorandum, Mr. Yates reminded adjudicating officers that the standard to be met in immigration petitions is “preponderance of the evidence” (meaning that the matter asserted is more likely than not to be true), and that they should not impose the standard of “beyond a reasonable doubt.” Interestingly, since the publication of this memorandum, immigration practitioners around the country report that the world of immigration is beginning to return to a more practical, hospitable environment.

III. New Developments with the H-1B visa

A variety of employment-based visas are available for employers to bring employees to the U.S. To obtain a nonimmigrant visa, an employer generally, with several exceptions, must submit a petition for nonimmigrant visa status on behalf of its prospective employee at a regional service center of the CIS. Thereafter, if the employee is outside of the U.S. (unless the employee is Canadian), the employee will need to apply to obtain a visa in his or her passport through a U.S. Embassy or Consulate abroad.

Perhaps the most known, and maligned visa category is the H-1B. Employers have routinely relied upon the H-1B visa to bring professional-level employees (i.e., employees with at least a BS degree or equivalent experience in a specific specialty) to the United States to fill specialized occupations. Unfortunately, the H-1B category (with the exception of university employees), as of October 1, 2003, is now subject to an annual cap of 65,000 (as opposed to the previous cap of 195,000) for each fiscal year (running from October 1 to September 30). Last year, as a consequence of a mad rush by employers to secure their professional workforces, the H-1B visas were gobbled up by mid-October.

In an effort to offer some relief to this shortage, Congress passed a new law, effective March 8, 2005, that allocated 20,000 additional H-1B visas for professionals who earned M.S. or higher degrees from universities in the U.S. Then, on March 4, CIS announced that it was not going to accept petitions for the new 20,000 H-1B visas authorized for M.S./Ph.Ds graduating from U.S. universities on March 8th, the effective date of the authorizing legislation. A few days later, on March 7th, CIS advised that the 20,000 visas would NOT be limited to M.S./Ph.Ds; the opening of the application period would be announced in a Federal Register notice to be published “soon.” While nobody outside of CIS seems to understand the exact basis for the announcement of this change in the education requirements, immigration practitioners surmise that it has to do with a bureaucratic assessment that they have already issued 20,000 M.S./Ph.D visas in FY05, and that the “extra” 20,000 therefore do not have to be limited to this category since the overall FY-05 allocations will satisfy the intent of the implementing legislation. As of the date of this article, the 20,000 H-1B visas have not become available to employers.

The new law has also imposed higher filing fees on (non-university) employers. Now, to obtain H-1B status, an employer may be required to pay filing fees as high as \$2,185. Accordingly, in light of the limitations on and expenses associated with H-1B visas, employers are increasingly turning to different visa options (including the L-1, E-1/E-2, O-1, P-1, H-3, J-1, and TN visa categories).

IV. PERM—The New Approach to Labor Certification

On December 29, 2004, the Department of Labor finally published the long-awaited regulations for Program Electronic Review Management (PERM). This new approach to labor certification (the first step toward permanent resident status for most foreign-born employees) went into effect on March 27, 2005. Employers, therefore, now must file Labor Certification Applications under PERM.

PERM allows on-line filing of labor certification applications. Similar to the Reduction in Recruitment (RIR) program under previous law, PERM requires employers to recruit qualified Americans or permanent residents in advance of filing the application. The PERM regulations require employers to conduct mandatory and alternative recruitment steps. After completing the recruitment campaign, if the employer cannot locate qualified and available American or permanent resident candidates, the employer must prepare a report (with supporting documentation) of its recruitment efforts and keep this documentation on file in case of a possible audit or request by a Certifying Officer. While the Department of Labor will no longer require submission of the evidence with the initial application (as it did under previous law), employers will need to ensure that they have fully complied with the applicable regulations. Otherwise, a few years down the road, employers could face criminal prosecution (in extreme cases) and employees could face revocation of their permanent resident status.

PERM allows an employer to withdraw an application (filed under previous law) and re-file under PERM. The Department of Labor's stated aim is to maintain the priority date of previously filed applications. Unfortunately, no regulations regarding the manner in which to convert such cases into PERM cases have been published. In the case of RIR filings, the previously filed RIR application can be withdrawn and a new PERM case can be filed. The priority dates for such cases, however, may be lost. This means that the filing of a new application under PERM could lead to a new priority date for those cases and lead to significant delays for professionals from certain countries subject to backlogs (such as China, India, and the Philippines).

These changes of the labor certification and PERM system have altered the way state workforce agencies process labor certification applications. State workforce agencies have forwarded all labor certification applications (standard and RIR) to two National Processing Centers in Atlanta and Chicago. Effective January 1, 2005, the state workforce agencies no longer accept labor certification applications. All applications under previous law have been forwarded to the National Processing Centers.

National Processing Centers will process applications on a "first-in, first-out" basis, regardless of the location where a case was originally filed. The Department of Labor believes this is a fair and equitable approach to all applicants and will, to the extent possible, transfer backlogged cases to two temporary backlog reduction processing centers in Philadelphia and Dallas, where the oldest cases will be processed first. These backlog reduction centers are scheduled to process all backlogged cases within the next two years.

These PERM regulations will transform the landscape of the labor certification process. While the new approach will be faster and help to streamline the process, it will also require employers to take additional recruitment steps, to comply with new wage requirements, and carefully to consider the manner in which to proceed with the employees for whom they have already filed applications for labor certification.

V. New Developments in Enforcement Activity

Enforcement activities have clearly become more dramatic in the wake of 9/11. The most impressive development in immigration enforcement recently arose in the case against Wal-Mart. Companies had never been responsible for verifying the legal status of employees of independent contractors. That responsibility belonged to the contractors. Nonetheless, in light of Wal-Mart's recent \$11,000,000 settlement with U.S. Immigration and Customs Enforcement (ICE), employers may want to rethink their approach to independent contract labor.

It is true that employers are not required to verify the legal status of legitimate independent contract labor. In the Wal-Mart case, however, ICE alleged that the retail giant had direct knowledge of immigration violations involving its cleaning contractors at stores across the country. Near the end of 2003, ICE agents raided Wal-Mart's headquarters and 60 of its stores across the nation, arresting more than 250 employees of independent contractors in an immigration crackdown. Using the borrowed Wal-Mart's price-cutting slogan, "Operation Rollback," ICE agents had engaged in a three-year undercover investigation of Wal-Mart stores that culminated in the high profile raids.

On May 18, 2005, Wal-Mart agreed to pay \$11 million to settle allegations that it knowingly used illegal immigrants to clean its stores. The settlement clears Wal-Mart of federal charges for hiring illegal immigrants.

Wal-Mart's payment of this fine, however, will not close this chapter completely for other potential targets. Michael J. Garcia, assistant secretary for ICE, said, "This case breaks new ground not only because this is a record dollar amount for a civil immigration settlement, but because this settlement requires Wal-Mart to create an internal program to ensure future compliance with immigration laws by Wal-Mart contractors and by Wal-Mart itself."

Though Wal-Mart's managers avoided criminal charges, its independent contractors were not as lucky. The dozen contractors who actually hired the laborers for work inside Wal-Mart stores agreed to plead guilty to various criminal charges. They also had to pay additional fines (beyond Wal-Mart's \$11 million) to the tune of \$4 million.

Conclusion

The immigration landscape will likely continue to evolve. A host of bills are before Congress right now, including bills for the Guest Worker Program, that could help to simplify labor shortages for employers and ease concerns over enforcement activities. In the meantime, since CIS officers continue to be under intense pressure to comply with these changing immigration rules and policies, employers will need to exercise caution and a healthy recognition that even a seemingly simple petition or application may contain traps to ensnare the uninitiated. Most important, like the immigration officers, employers themselves will need to ensure that they are adhering carefully to the letter of old and new immigration laws, and that they are not exposing themselves or their employees to DHS's enforcement options. With so much change, these times can be extremely stressful for employers and their foreign employees. Nonetheless, the assistance of competent legal counsel can do a great deal to ease the concerns of employers and their employees and help to avoid the pitfalls and complications that are lurking in the changing world of immigration.

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