WILMERHALE

President Signs L-1 Visa and H-1B Visa Reform Act of 2004--A Limited and Expensive Blessing

2004-12-09

Although hailed mostly for its limited relief to the H-1B cap, the L-1 Visa and H-1B Visa Reform Act (the Visa Reform Act)—signed into law by President Bush yesterday as part of the Fiscal Year 2005 Omnibus Spending Bill—also changes the way many employers process and plan for H-1 and L-1 foreign national employees, and significantly raises visa application-related fees. The majority of the provisions regarding H-1B visas take effect 90 days after signature, i.e., March 8, 2005, while those affecting L-1 visas become active 180 days after signature, i.e., June 7, 2005.

H-1B Visa Reform

The H-1B section of the Visa Reform Act provides some very limited, but much needed, relief to the 65,000 cap on H-1B workers. Specifically, the legislation exempts from the 65,000 H-1B cap a maximum of 20,000 petitions for H-1B visas filed for foreign nationals who hold master's or higher degrees received from US universities. This provision will apply to the current fiscal year (which began on October 1, 2004), although the exact process for additional petitions under this legislation is not final.

Additionally, the formerly sunsetted "Education and Training Fee" for all H-1B petitions for a new employee, change of employer and first extension now is permanent and raised to $1,500, although employers with 25 or fewer US employees only will be required to pay $750. These fee changes become effective immediately upon enactment. Therefore, this additional fee is applicable. An additional "fraud fee" of $500, effective only 90 days after enactment, will be required for all employers and/or principal employees filing initial or change in status H and L petitions. Thus, for most employers, an H-1B petition for FY 2006 requires $2,000 in additional fees, even without the $1,000 premium processing for expedited adjudication of petitions.

In addition, the legislation:

- Requires employers to pay all H-1B workers 100% of the prevailing wage rate, rather than 95%
- Makes permanent the nondisplacement attestations on the Labor Condition Application required by employers who are H-1B dependent, or who have been found to have

committed an immigration-related willful failure or misrepresentation during the preceding five years

- Allows the Department of Labor to investigate abuses of the H-1B program without first receiving a complaint, but, with limited exceptions, requires it to inform employers prior to the commencement of an investigation
- Excuses employers who acted in "good faith compliance" from technical violations of the H-1B compliance rules, and provides them with a 10-day period in which to correct violations
- Requires the Department of Homeland Security to maintain and report statistical information regarding all H-1B visas issued that were exempt from the cap

L-1 Visas

The changes to the L-1 visa provisions that are used to transfer foreign employees to the US largely target what had been perceived as fraudulent uses of the L-1 visa category. Specifically, the legislation prevents L-1B visa holders from being primarily stationed at the work site of another employer (a) in order to provide labor or services for the non-petitioning employer or (b) if they are being controlled and supervised by a non-petitioning employer. In addition, the legislation:

- Strikes the provision permitting a six-month work requirement (rather than one year) for L Blanket petitions
- Requires the Department of Homeland Security to maintain and report statistical information regarding all L-1 visas issued and the number of visa holders that work primarily off-site
- Mandates the development of an L Visa Interagency Task Force to report on the efforts to address the vulnerabilities and potential abuses of the L visa

For further information on how these new provisions will affect your visa petitions, or on any other immigration-related matter, please contact a member of the WilmerHale Immigration Group.