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Immigration Insights (January 2010)

January 29, 2010

"Administrative Processing" in U.S. Visa Applications

When your employee applies for a nonimmigrant visa at a U.S. embassy or consulate abroad, keep in mind possible (and sometimes unforeseen) delays due to what the U.S. government calls "administrative processing."

The U.S. Department of State (DOS) website offers a helpful "Visa Wait Times" list here. The posted Visa Wait Times indicate the usual number of days it is now taking a particular U.S. embassy or consulate to schedule a visa interview/appointment for your employee, issue the requested nonimmigrant visa, and return the applicant's passport to him or her.

However, you and your employee should realize that not all visa applications go through the process without delay. While, with fastidious preparation, an applicant can often avoid delays stemming from forgetting a document, presenting an inadequate set of documents, or presenting incorrect or incomplete information that triggers either a denial or a field investigation, there is one factor that is largely beyond your employee's control. U.S. consular officers can issue a "provisional" (temporary) denial based upon "administrative processing."

Administrative processing can mean many things, but in most simplest terms, it means that the U.S. government has determined that some sort of additional security check or other clearance is necessary before the visa can be issued. Various factors can lead to such additional check, including but not limited to:

1. the company requiring, or individual possessing, education or experience in a discipline such as nuclear technology, supercomputers, global positioning systems, etc. that appears on the U.S. government's technology alert list and that triggers the consular officer's decision to seek extra security clearances;

2. the applicant's past arrest or conviction for an offense; or

3. a "hit" that results from some government data mining (such as your employee's name being similar to someone who is on a watch list, a prior address being the same building as someone of interest to the government, etc.)

If administrative processing occurs -- which is more common now due to the Northwest/Delta incident and the earlier issuance of a U.S. visa to the alleged terrorist who was on one of the government's lower grade lists -- you and your employee can expect a delay in visa issuance for anywhere from two weeks to several months.

While your employee cannot generally do anything to avoid administrative processing and while the U.S. government will, absent extraordinary circumstances, not short-circuit the usual time frames for this extra

processing to be completed, you and your employee can take a few steps to minimize the inconvenience if the U.S. government triggers administrative processing:

1. Alert your employee's manager that he or she is applying for a U.S. visa and the possibility of delay if a security check complication ensues so the manager is not surprised;

2. Have a Plan B available that enables your employee to live and work abroad if his or her return is delayed due to administrative processing; and

3. Recommend that your employee purchase airline ticket insurance so that if he or she has to change the U.S.-bound return flight, he or she does not face a substantial penalty when booking a new flight.

PERM Processing Times Updated

The U.S. Department of Labor (DOL) Employment and Training Administration updates its processing times for PERM labor certifications usually each month on its website. Employers and employees can check this website to gauge where DOL's processing stands in relation to labor certification cases already filed. As of December 31, 2009, DOL was processing regular, unaudited labor certification cases that were submitted in March 2009. The standard processing time for regular unaudited labor certifications remains steady at approximately 10 months. For audited cases, DOL is deciding cases that were submitted in December 2007, which is a step forward by one month and which decreases the audited case processing time to approximately 24 months.

BIA Decision in *Matter of Neto* Renews Hope for Many in Removal Proceedings

Under the *American Competitiveness in the Twenty-First Century Act* (AC21) applicants for permanent residence based on approved immigrant visa petitions are permitted to "port" or change jobs to a job of the same or similar occupational classification once the permanent residence application has been pending for at least 180 days.

The freedom to change jobs provided by AC21 was somewhat marred in 2005 by the Board of Immigration Appeals (BIA)'s decision in *Matter of Perez-Vargas*. In that case the BIA decided that a determination of whether a new job is in the same or similar occupational classification involved the adjudication of an employment-based visa petition and that immigration judges had no jurisdiction to make a "redetermination of the visa petition's validity," by deciding whether a new job was in the same or similar occupational classification as the old job. For those applicants in removal (deportation) proceedings this decision left applicants out in the cold because it prevented immigration judges from determining the validity of the visa petition and often eliminating the last possibility for the foreign national the ability to exercise portability in removal proceedings.

The uncertainty that the *Matter of Perez-Vargas* created was all but erased in the recent BIA decision, *Matter of Neto*. The case overrules *Matter of Perez-Vargas* and allows immigration judges to make the decision on whether a new job is in the same or similar occupational classification as the old job, which maintains the foreign national's eligibility for permanent residence. The decision in *Matter of Neto* gives renewed hope to the many who are in the midst of removal proceedings.

Eleven New Countries Eligible for H-2A and H-2B Temporary Work Visa Program

Under the H-2A and H-2B temporary worker visa regulations, the issuance of visas is limited to countries designated periodically by the Department of Homeland Security. The H-2A and H-2B visa categories are for seasonal and temporary jobs for which U.S. workers are not available The new list published on January 18, 2010 added the following 11 new countries: Croatia, Ecuador, Ethiopia, Ireland, Lithuania, Netherlands, Nicaragua, Norway, Serbia, Slovakia, and Uruguay. These 11 countries join the following 28: Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine, and United Kingdom.

Should Employers Rush to File H-1B Cases On April 1?

On March 31, 2010, U.S. employers may begin to file H-1B (specialty occupational professional) work visa petitions so that U.S. Citizenship and Immigration Services ("CIS") receives them on April 1, 2010, the first day of the H-1B filing window for the next federal year. H-1B petitions filed for FY2011, if approved, would be effective October 1, 2010. The H-1B visa category, which includes a total of 85,000 "slots" per government fiscal year, reached its limit for FY2010 on December 21, 2009.

While the cap for FY2010 was not met on the first day or week as it had been in recent years, this is still a critical time for employers to consider filing H-1B cases for FY2011 for two reasons. First, just because the FY2010 cap was not met until December 2009, there is no way to definitively say that the FY2011 limit will not be reached on the first day as it had been in years prior. Do we think it is likely the cap will be met on April 1? Probably not, but if you have critical new hires or existing employees, our recommendation is to file on April 1, 2010.

Second, we believe that FY2011 is a great opportunity for employers to change the status of those employees who have time limited work authorizations or are in a status that does not allow for the filing of permanent resident applications. With current Employment-based Third Preference (green card) backlogs, employees could wait for 7-10 years at least before reaching the end of the green card process. This lengthy wait far exceeds the time allowable to remain in the U.S. under many visa categories. For example, L-1 employees are limited to either 5 or 7 years work authorization. Without having their status changed to another visa category, there is a high likelihood that L-1 employees will max out of L-1 visa time before they obtain a green card.

In contrast, while H-1B specialty workers are generally limited to 6 years work authorization, there is an exception that allows employees in H-1B status to extend their temporary work status beyond the 6th year in limited circumstances. By changing the status of L-1 foreign nationals to H-1B, an employer is opening the door to extensions beyond the 6th year -- a benefit that has become critical in many circumstances. In times of extensive delays and backlogs to muddle through the permanent residence process, this ability to maintain work authorization is invaluable to many employers and employees.

So, should employers rush to file H-1B cases on April 1? Yes, first to ensure important employees are able to obtain work authorization and second, to take advantage of an opportunity that may not come along again for years.