

Immigration News and Updates

December 9, 2004

Yesterday, December 8, 2004, President Bush signed the \$388.4 billion Omnibus Appropriations Act for FY 2005 (H.R. 4818). This Act contains provisions affecting the H-1B and L-1 nonimmigrant visa categories. The Act's provisions are intended to reform the H-1B and L-1 program and are the result of concerns over out-sourcing and displacement of U.S. workers, a slow economy, and concerns over security. The provisions are also intended to raise money for education and training of U.S. workers. What follows is a break-down of the reform:

H-1B Visa Reform Act of 2004

- While the cap remains at 65,000, Congress has now created an exemption to the cap for foreign nationals who hold Master's or higher degrees from U.S. universities or institutes of higher education. The Act creates 20,000 new visas for these foreign nationals. U.S. Citizenship and Immigration Services ("CIS") will provide additional guidance on eligibility and processing at a later date, as this provision is not effective until March 8, 2005.
- The Act restores the non-displacement requirement upon H-1B dependent employers. This non-displacement requirement prohibits employers from displacing U.S. workers with H-1B workers within the period beginning 90 days prior to, or following, a petition from an H-1B worker.
- The Act reinstates the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee to train the U.S. workforce. The fee has now been raised to \$1,500 for employers having more than 25 employees. For those employers who have 25 employees or less, the training fee is \$750. This fee is effective immediately. The following employers are exempt from the training fee: 1) institutions of higher education and related or affiliated non-profit organizations, 2) non-profit and governmental organizations, 3) any employer who is filing a second or subsequent extension of stay for an H-1B visa holder, 4) primary and secondary educational institutions, and 5) non-profit entities which are engaged in "established curriculum-related clinical training of students".
- The Act creates a new "Fraud Prevention and Detection Fee" of \$500. Employers seeking to sponsor H-1B workers will be required to pay the fee. The only exemptions to payment of the fraud fee are for those foreign nationals seeking amendments or extensions of status with the same petitioning employer. The new fraud fee applies to all petitions filed with U.S. CIS on or after March 8, 2005.
- Public Law 108-441 extends the "Conrad 30" J-1 program covering certain medical graduates. Those foreign nationals currently in the U.S. in J-1 status who have received a waiver of the two-year residency requirement (if requested by either a federal or state agency) are now exempt from the H-1B cap.
- The Act also provides the U.S. Department of Labor substantial new enforcement powers, which take effect as if the law were enacted on October 1, 2003. As an example, the Act now grants the Department of Labor the authority to initiate investigations without receiving a complaint if it believes there is "reasonable cause" that an employer is not in compliance with the Labor Condition Application.

L-1 Visa Reform Act of 2004

- Previously, foreign nationals employed at a company that participated in the L Blanket program could be eligible for L-1, intracompany transferee status after only six months of employment with the affiliated or subsidiary

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company abroad. The Act changes the qualified period of employment for all Intracompany transferees to one year. This requirement applies to all new L-1 applications. It does not apply to extensions of status for those who are already present in the U.S. U.S. CIS will publish processing guidelines for these applications at a later date, as the new eligibility requirement applies to all petitions filed with CIS on or after June 6, 2005.

- In response to the concerns regarding "out-sourcing", the Act prohibits L-1B visa holders from working primarily at a site other than their petitioning employer's. The placement of any L-1B workers off-site must be in connection with providing services utilizing the petitioning employer's specialized knowledge or proprietary technology. This limitation will apply to all L-1B petitions filed with U.S. CIS on or after June 6, 2005, and applies to all new, amendment and extension petitions.
- The Act creates a new Fraud Prevention and Detection Fee of \$500. Employers seeking to sponsor L-1 workers will be required to pay the fee. The only exemptions to payment of the fraud fee are for those foreign nationals seeking amendments or extensions of status with the same petitioning employer. The new fraud fee applies to all petitions filed with U.S. CIS on or after March 8, 2005.

As soon as the implementing regulations and CIS guidelines for eligibility are published, we will forward that information on to you. For any specific questions of eligibility under the H-1B Reform Act of 2004 or the L-1 Visa Reform Act of 2004, please contact our office.

For more information about this, or other U.S. immigration issues, please contact our Miller Canfield Immigration Practice. This message is for general information only and should not be used as a basis for specific action without obtaining further legal advice.