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New Law Allows Employers To Retain Foreign Workers

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Delays at the Immigration and Naturalization Service ("INS") as well as the Department of Labor ("DOL") may cause many problems for employers of foreign workers. In particular, employees in temporary H-1B status who seek status as lawful permanent residents confront regulatory deadlines.

Employers invest time and money in a slow immigration process while their foreign employees advance inextricably towards the six-year H-1B limitation on temporary stay and eventually have to depart the U.S.

Although the process for obtaining lawful permanent residence may continue even if the employee moves abroad, he or she must remain outside the U.S. for at least one year in order to qualify for a new six-year H-1B stay, unless the green card process is completed earlier. In the meantime, the employee's absence may disrupt business and necessitate alternative staffing arrangements.

In response to this problem, President Bush is expected to sign the 21st Century Department of Justice Appropriations Authorization Act. The new law will permit H-1B workers that have labor certification applications caught in lengthy agency backlogs to extend their status beyond six years.

If these workers have already exceeded the six-year time limit, then their employer may file a new H-1B petition so the employee can return from abroad or otherwise re-obtain H-1B status. The new law expands the provisions of the American Competitiveness in the 21st Century Act ("AC21"), enacted two years ago.

Green Card

Lawful permanent resident status, evidenced by a "green card", is worth the wait because it offers many benefits. The status allows foreign workers to work and remain indefinitely in the U.S. Permanent residents may also work on commercial or defense-related projects that are subject to export control requirements without additional federal licenses in many cases.

Employers who wish to obtain green cards for their H-1B workers must, in most cases, first prove to DOL that they cannot find a qualified U.S. worker for the position despite recruiting through print media and the Internet. (This step can be bypassed only for multinational managers, outstanding researchers, people of extraordinary ability, or when the foreign employee is performing work in the national interest.)

In the second step, the employer must file an Immigrant Petition with the INS on behalf of the employee. The employer may not file the Immigrant Petition until DOL has approved the Application for Alien Employment Certification.

In the third step, the employee has the option of filing an application either with the INS for adjustment of status to lawful permanent resident or with the Department of State for an immigrant visa.

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AC21

AC21 addressed the problem within the INS and DOL of lengthy adjudications, which prevented or delayed employees' applications for lawful permanent resident status. The intent of AC21 was to allow temporary H-1B workers to remain in the U.S. until INS adjudicated their applications for lawful permanent resident status. AC21 required INS to grant H-1B workers additional time in one-year increments, provided that one year or more has passed since the filing of the Application for Alien Employment Certification with the DOL *and* provided that the employer had also filed an Immigrant Petition for the H-1B worker.

The problem was that DOL often exceeded one year in processing Applications for Alien Employment Certification, and the employer could not yet file the Immigrant Petition to qualify their employees for additional time in H-1B status.

The 21st Century Department of Justice Appropriations Authorization Act specifically targets DOL processing delays. The new law requires INS to grant H-1B workers additional time in one-year increments when one year or more has passed since filing the Application for Alien Employment Certification with the DOL, even if the employer has not yet filed the Immigrant Petition in the second step of the process. Employers will no longer need to wait until DOL approves their Applications for Alien Employment Certification before they can petition INS to keep their H-1B workers beyond the sixth year.

Connecticut employers should benefit greatly from this new law. The Connecticut Department of Labor is still conducting the initial review of Applications for Alien Employment Certification received on April 30, 2001. In order to take advantage of the new law, employers should file petitions with the INS on behalf of their current or former H-1B employees to extend or reinstate their status. ■