

Changes in non-immigrant visa provisions

The recently enacted Omnibus Appropriations Bill for Fiscal Year 2005 contains numerous business immigration-related measures. The most salient of these make significant changes to H-1B and L non-immigrant visa categories.

Provisions of the law offer new opportunities and considerations for strategic immigrant (green card) and non-immigrant planning for human resources professionals, house counsel and other business professionals responsible for the immigration or recruiting function in various business organizations.

The following is an overview of the provisions of the new law.

H-1B visas

Reinstates Department of Labor training fee with modifications: The new law establishes additional fees for employers beyond the current \$185 charge for filing a petition for a nonimmigrant worker (Form I-129).



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David H. Nachman

It reinstates and increases the additional fee imposed by the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). That fee expired Oct. 1, 2003.

The Omnibus Appropriations Act also reinstates and raises to \$1,500 the Department of Labor (DOL) training fee originally implemented pursuant to ACWIA. Employers with no more than 25 full-time workers (determined by taking into account an organization's affiliates or subsidiaries) can pay a reduced training fee of \$750. Under ACWIA, certain types of petitions were exempt from the training fee. Under the new law, it appears those exemptions still are in effect and the new fees need not be paid.

Exempt from this fee are: institutions of higher, secondary or primary education, nonprofit entities related to an institution of higher education, nonprofit research organizations, nonprofit entities engaging in an established curriculum-related clinical training, and governmental research organizations. Also exempt are second or subsequent requests for extensions of stay filed by the same employer (regardless of

David H. Nachman, a partner at Nachman & Associates in Upper Saddle River, is a member of the American Immigration Lawyers Association. He is an adjunct professor of paralegal studies at Fairleigh Dickinson University and Bergen Community College. Nachman annually moderates the Institute for Continuing Legal Education program on "The ABCs of Immigration Law."

whether the employer was or would be required to pay the training fee for the initial petition or first extension), and amended petitions not containing a request for an extension of stay or to correct a Citizenship and Immigration Services (CIS) error.

The \$1,500 and \$750 fee appears to apply to petitions filed with CIS after Dec. 8, 2004 **Establishes new fraud fee:** The new law creates a \$500 fraud prevention and detector fee to help the government finance investigations.

Petitioners seeking either an initial or a transfer of an H-1B or an L nonimmigrant visa must pay this fee.

Any petition to amend or extend made for a beneficiary for the same organization is exempt from the fraud fee.

That fee will apply to petitions beginning March 8.

Creates new H-1B cap considerations: The law creates new and important exemptions from the annual H-1B cap.

There are an additional 20,000 H-1B non-immigrant visas on a fiscal year basis for beneficiaries holding a master's degree or higher from a U.S. institution.

Once these newly prescribed 20,000 visas have been used, CIS must count additional cases against the cap for the fiscal year.

L-1 Visas

Establishes new fraud fee: The new law creates a \$500 fraud prevention and detection fee with identical provisions to H-1B classification above.

Reinstates one year of work for qualification under L-1A/L-1B: L-1 temporary workers must have worked one full year outside the United States for an employer with a qualifying relationship to the petitioning employer.

This change applies to petitions for initial L-1 classification filed with CIS beginning June 6.

Changes/notifies L-1B "specialized knowledge" worksite placement: In response to numerous complaints, the new law mandates L-1B temporary workers can no longer work primarily at a worksite other than with the petitioning employer if the work will be "controlled and supervised" by a different employer or if the offsite arrangement is essentially to provide labor for hire rather than service related to the specialized knowledge of the petitioning employer.

This will apply to all L-1B petitions beginning June 6 as well as all extensions and amendments for those currently in L-1 status.

The new law re-establishes the DOL's audit powers in connection with previously designated investigations of violations under ACWIA. It permits DOL to investigate non-compliant employers under a host of circumstances. Employers are reminded it is unlawful to retaliate against employees who complain about employer's violations of the laws.

Of particular interest are changes to the prevailing wage rules and regulations. Beginning March 8, the salary offered on all H-1B petitions must be

100 percent of the prevailing wage or the actual wage, whichever is higher. Now, employers could pay H-1B workers 95 percent of the prevailing wage. In an improvement over the way DOL calculates prevailing wage, the new rules require the agency to revise its wage surveys to reflect at least four levels of wages commensurate with experience, education and level of supervision rather than the two levels currently used.

As yet, there are no regulations that interpret the new law.