

## MAY/JUNE 2007

The law firm of **Klasko, Rulon, Stock & Seltzer, LLP** is pleased to present our *May/June 2007* newsletter covering immigration topics that are of interest to our clients.

### Headlines:

- **1. Full Senate Considering the Border Security and Immigration Reform Act of 2007** - The Senate is debating this bill, frequently called the Senate "Grand Bargain" Bill.
- **2. DOL Issues Final Rule Requiring Employers to Pay Labor Certification Costs and Making Other Changes** - DOL issues Final Rule requiring employers to pay the costs relating to the permanent labor certification process and also, among other things, eliminates substitution of beneficiaries.
- **3. DHS Issues Final Rule on Petitioning Requirements for O and P Nonimmigrants** - DHS issued a final rule to permit petitioners to file O and P nonimmigrant petitions up to one year before the petitioner's need for the worker's services.
- **4. "Other Worker" Visa Category Becomes Available; Some Categories Make Significant Moves Forward** - The "other worker" category becomes available beginning June 1, 2007, with an October 1, 2001, cut-off date; other categories make big move forward and should not retrogress at least for the remainder of fiscal year 2007.
- **5. USCIS Issues Final Rule Removing Standardized Request for Evidence Timeframe** - The final rule maintains the current 12-week standard as a ceiling on the response time to be provided, and sets a maximum of 30 days to respond to a Notice of Intent to Deny.
- **6. Seventh Circuit Finds Labor Dep't, Not DHS, Decides Job Requirements** - The determination of what kind of training is required to classify someone as a "skilled" worker is made by DOL, not DHS.
- **7. Court Finds Jurisdiction to Review Adjustment Application Before Renewal in Removal Proceedings** - Ninth Circuit precedent supported the finding that the court had jurisdiction to review the USCIS's denial of adjustment of status.
- **8. USCIS Proposes Revisions for Religious Worker Visa Classifications** - USCIS is proposing a variety of changes.
- **9. Change in Agency Names** - The Bureau of Immigration and Customs Enforcement has become U.S. Immigration and Customs Enforcement (ICE), and the Bureau of Customs and Border Protection is now U.S. Customs and Border Protection (CBP).
- **10. Klasko News** - NAFSA Annual Conference and reception.
- **11. Government Agency Links**

## **1. Full Senate Considering the Border Security and Immigration Reform Act of 2007**

The full Senate is debating the Senate's "Grand Bargain" Bill which provides for enhanced border security, tougher interior enforcement of immigration laws, and a new mandatory system of electronic employment verification to improve workplace enforcement. The Bill includes many important and positive provisions including broad legalization, family backlog clearance, Agjobs, and DREAM Act, but couples these with unacceptable provisions that would harm families and workers for decades to come. The Bill eliminates current family preference categories and limits future family immigration to spouses and minor children of citizens and permanent residents, caps parents of citizens at 40,000, and makes no provision for those who have been in the family backlog for two years or less. It also eliminates current employment-based immigration categories and puts in their place a new "merit-based" point system with totally inadequate prospective numbers (approximately 140,000 per year until the family backlogs are cleared over an 8 year period). The new "point system" contains no provisions for multinational managers, extraordinary ability aliens, outstanding professors or researchers, or those doing work in the national interest. In addition, there would be no labor market test to protect native-born workers.

The Bill also provides a new Y temporary worker program which provides only a two-year nonimmigrant visa and requires that workers leave the U.S. for one year before being eligible to renew their work visa for a subsequent two-year period. There is no "bridge" to allow essential and highly skilled but non-degreed workers a path to eventual permanent lawful status so the net effect is a constantly churning workforce. There is a carve-out of 10,000 green cards per year for "essential" Y workers, but it appears they could not seek a permanent visa while in the United States. The future legal immigration program (after eight years of backlog clearance) provided for in the Senate Bill contemplates a legal immigration system composed of 380,000 work visas and 127,000 family-based visas, plus unlimited visas for spouses and minor children of citizens, and some number of refugee visas. These numbers are totally inadequate. All economic projections and assessments of family unity needs point to the need for at least 1.8 million visas per year in the future. Unless amended, this proposed Bill guarantees that new backlogs will grow immediately, and that undocumented immigration will continue. This is no solution.

Finally, the legalization provisions in the Senate Bill require currently undocumented workers to register for a temporary work permit (Z visa), and then, before receiving final lawful permanent status in 8-13 years, to travel to their home countries and file an application with the U.S. consulate there. Z visa-holders would not be permitted to sponsor spouses or minor children who are outside the U.S. as of January 2007. While the legalization program provisions are broad and include a generous cut-off date of January 2007, the obstacles inherent in too-tight deadlines, costs, and required contact with overseas consulates are obstacles that must be addressed to assure that all who qualify for legalization can obtain permanent legal status. The final contour of this Bill will depend upon what proposed amendments pass in the next two weeks and the fate of the Bill is far from clear.

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## **2. DOL Issues Final Rule Requiring Employers to Pay Labor Certification Costs and Making Other Changes**

The Department of Labor (DOL) published a Final Rule in the Federal Register on May 17, 2007, implementing a package of changes to the labor certification process. This new Rule prohibits an employer from seeking or receiving payment "of any kind for an activity relating to obtaining permanent labor certification, including payment of the employer's attorney's fees." In addition, the Rule specifies that if the same attorney is representing both the employee and the employer in the labor certification process, any cost relating to assistance to the employee must also be borne by the employer. The commentary published with the Rule

makes it clear that the prohibition extends to the common practice of requiring an employee to sign a payback agreement (in which the employee agrees to reimburse the employer if he or she resigns during the process or within a certain time after obtaining permanent residence). The payment requirement only extends to the labor certification process, and not to the other steps of the "green card" process.

The new Rule also changes current law and practice under which labor certifications, once issued, are valid indefinitely, and if not needed for the original beneficiary, can be re-used for another qualified worker. The new Rule eliminates substitution of beneficiaries (allowing an employer to use an approved labor certification on behalf of another employee) and requires any immigrant visa petition on the basis of a labor certification to be filed within 180 days of the approval of the labor certification. The new Rule also provides that labor certifications are not to be articles of commerce and may not be bought or sold for money or anything else of value.

Finally, this Rule imposes a new sanction on employers and their attorneys and agents if DOL finds a willful material misrepresentation in the process or violation of the requirements relating to payment of attorney fees and other costs of the labor certification process. The Rule includes the authority to debar employers and their attorneys and agents from filing labor certifications for up to three years if they are found to have engaged in misrepresentations, prohibited payments, or a pattern or practice of failure to comply with the terms of employment offered in labor certification, the audit process, or the supervised recruitment process. The effective date of this Final Rule is July 16, 2007.

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### **3. DHS Issues Final Rule on Petitioning Requirements for O and P Nonimmigrants**

The Department of Homeland Security (DHS) issued a Final Rule effective May 16, 2007, to permit petitioners to file O and P nonimmigrant petitions up to one year before the petitioner's need for the worker's services. The Rule is intended to enable petitioners who are aware of their need for the services of an O or P nonimmigrant well in advance of a scheduled event, competition, or performance to file their petitions under normal processing procedures. "This way, petitioners will be better assured that they will receive a decision on their petitions in a timeframe that will allow them to secure the services of the O or P nonimmigrant when such services are needed," DHS said.

Current regulations governing both O and P nonimmigrants preclude the petitioner from filing a Form I-129 (Petition for Nonimmigrant Worker) more than six months before the actual need for the alien's services. The Final Rule does not apply the one-year filing timeframe to other nonimmigrant classifications associated with Form I-129. According to DHS, the nature of O and P employment is different from other nonimmigrant visa classifications. Extending the filing period for other nonimmigrant classifications using Form I-129 "may result in the increased potential for fraud and abuse as well as an increase in case filings where the need for the alien's services has not fully materialized," DHS explained.

The final rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-7134.pdf>.

Average petition processing times are available at <https://egov.immigration.gov/cris/jsps/ptimes.jsp>.

#### 4. Some Categories Move Forward Significantly

The Department of State's Visa Bulletin for June 2007 has included a cut-off date of October 1, 2001, for "Other Workers," and June 1, 2005, worldwide cut-off date for EB-3, with a June 1, 2003, cut-off date for China, India, and Mexico. The EB-2 cut-off date for China advanced to January 1, 2006, and the cut-off date for India advanced to April 2004. One consequence of rapid cut-off date advancement is the inevitable increase in demand for visa numbers as adjustment of status cases are brought to conclusion at USCIS offices. Such increased demand could lead to retrogressions in the future. The Department said it would provide as much advance notice as possible should this occur.

The June 2007 Visa Bulletin, which contains the latest information on visa number availability, is available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3219.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3219.html).

#### 5. USCIS Issues Final Rule Removing Standardized Request for Evidence Timeframe

U.S. Citizenship and Immigration Services (USCIS) issued a Final Rule, effective June 18, 2007, to provide flexibility to the agency in setting the time allowed to applicants and petitioners to respond to a Request for Evidence (RFE) or to a Notice of Intent to Deny (NOID). Specifically, the Final Rule maintains the current 12-week standard as a ceiling on the response time to be provided in RFE cases, and sets a maximum of 30 days to respond to a NOID.

The Rule also describes the circumstances under which the agency will issue an RFE or NOID before denying an application or petition, but USCIS said it will continue generally to provide petitioners and applicants with the opportunity to review and rebut derogatory information. The Rule also clarifies when petitioners and applicants may submit copies of documents in lieu of originals. USCIS said it intends to issue policy guidance setting clear standards for when a timeframe less than these maximums will be afforded before the effective date of the rule.

The final rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-7228.pdf>.

#### 6. Seventh Circuit Finds Labor Dep't, Not DHS, Decides Job Requirements

In *Hoosier Care, Inc., v. Chertoff*, the U.S. Court of Appeals for the Seventh Circuit noted that the DHS's Administrative Appeals Office (AAO) had ruled that two workers' college majors were not relevant postsecondary education for prospective positions in a residential care facility for profoundly disabled children and adults because neither agriculture nor transportation is a field of knowledge that relates to the care of such persons. Relevant majors, the AAO suggested, would include those in such fields as psychology and education. Although the court said that interpretation was not necessarily unreasonable, it noted that the determination of what kind of training is required to classify someone as a "skilled" worker is made by the Department of Labor (DOL), not DHS, which determines whether the worker satisfies those requirements; that is, DHS decides whether he or she has the training DOL believes is required for the job. The full text of the case is available at <http://www.bibdaily.com/pdfs/Hoosier%20Care%207%204-11-07.pdf>.

## 7. Court Finds Jurisdiction to Review Adjustment Application Before Renewal in Removal Proceedings

In *Hillcrest Baptist Church v. U.S.A.*, the plaintiffs filed a complaint for relief after U.S. Citizenship and Immigration Services (USCIS) denied their adjustment of status applications. The government moved to dismiss because the plaintiffs had not renewed their applications in removal proceedings and, thus, had not yet exhausted their administrative remedies. The U.S. District Court for the Western District of Washington concluded, however, that Ninth Circuit precedent supported the finding that the court had jurisdiction to review USCIS's denial of adjustment of status.

The full text of the decision is available at [http://bibdaily.com/pdfs/Hillcrest 2-23-07.pdf](http://bibdaily.com/pdfs/Hillcrest%202-23-07.pdf).

## 8. USCIS Proposes Revisions for Religious Worker Visa Classifications

U.S. Citizenship and Immigration Services (USCIS) is proposing to amend existing regulations pertaining to special immigrant and nonimmigrant religious worker visa classifications. The proposed rule focuses on how the agency can best ensure the integrity of the religious worker program by eliminating opportunities for fraud in the program while, at the same time, streamlining the process for legitimate petitioners.

USCIS is proposing a variety of changes, including but not limited to requiring the filing of a petition in every instance (the requirement already exists for special immigrants and for organizations seeking to extend the stay or adjust status for nonimmigrant religious workers already in the U.S.). USCIS said this proposed requirement will allow the agency to verify the legitimacy of the petitioner and the job offer before the issuance of a visa or admission to the U.S. USCIS also would notify petitioners that the agency may conduct on-site inspections of any organization seeking to employ either a nonimmigrant or a special immigrant religious worker. Inspections would be "intended to increase deterrence and detection of fraudulent petitions and to increase the ability of the agency to monitor religious workers and ensure their lawful status in the U.S. is maintained."

USCIS also is proposing to amend the standard initial period of stay for nonimmigrant religious workers from three years to one. In addition, every petition for an R-1 classification would be required to be initiated by a prospective or existing employer through the filing of a Form I-129 (Petition for Nonimmigrant Worker) with USCIS. The beneficiary (the religious worker) would no longer be able to obtain an R-1 visa at a U.S. consulate abroad or at a port-of-entry without prior approval of the I-129 by USCIS.

In addition, USCIS proposes to change certain related definitions. For example, USCIS proposes to expand its interpretation of prior work experience to include work that is not in the "exact same" position as the job offered. Also, USCIS proposes to expand the definition of "religious occupation" to focus on duties that "primarily, directly, and substantially relate to the religious beliefs or creed of the denomination." Such a change, USCIS said, distinguishes between committed religious work and non-qualifying work that, while it may be incident to religious duties, cannot by itself warrant classification in the religious worker category.

Public comments are being accepted until June 25, 2007. For more information, see <http://www.uscis.gov/files/pressrelease/RvisaRelease19Apr07.pdf> (announcement) and <http://www.uscis.gov/files/pressrelease/RvisaFactSheet19Apr07.pdf> (fact sheet).

## 9. Change in Agency Names

The Department of Homeland Security (DHS) has changed the name of the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement (ICE), and the name of the Bureau of Customs and Border Protection to U.S. Customs and Border Protection (CBP). The notice is posted at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-7659.pdf>.

## 10. Klasko News

### 2007 NAFSA Annual Conference

H. Ronald Klasko, William A. Stock, and Suzanne B. Seltzer will be presenting sessions at the NAFSA: Association of International Educators Annual Conference in Minneapolis, MN, from May 27 - June 1. Klasko partners invite you to attend their sessions if you're at the conference! Here is a list of topics/dates when our partners will present:

#### **Tuesday, May 29, 2007**

2:30 p.m. - 3:45 p.m.

"H-1B Update"

by H. Ronald Klasko

#### **Wednesday, May 30, 2007**

9:15 a.m. - 10:15 a.m.

"Policies and Procedures for Addressing Complicated H-1B Issues"

by Suzanne B. Seltzer

"Poorly Worded, Ambiguous Regulations are Par for the Course:  
Developing Policies When F & J Regs Aren't Clear"

by William A. Stock

#### **Thursday, May 31, 2007**

4:00 p.m. - 5:15 p.m.

"Advising Foreign Nationals on International Travel"

by H. Ronald Klasko

#### **Friday, June 1, 2007**

11:15 a.m. - 12:30 p.m.

"Is Special Handling Really So Special"

by Suzanne B. Seltzer



**NAFSA**

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An extensive collection of articles relating to universities is available at <http://www.klaskolaw.com/events-calendar.php?action=view&id=13> for your convenience. For more information on this conference or to request presentations materials, contact Ron, Bill, or Suzanne.

## **Klasko Cocktail Reception**

Our Klasko/NAFSA Cocktail Reception will be held in the Burnet Gallery at the Chambers Hotel on **Thursday, May 31 from 5:30pm - 7:30pm**. If you're in Minneapolis, come join partners **Ron Klasko, Bill Stock, and Suzanne Seltzer** for a relaxing evening with great food and fine art. For additional event details, e-mail Suzanne at [sseltzer@klaskolaw.com](mailto:sseltzer@klaskolaw.com).



## **11. Government Agency Links**

*Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:*

USCIS Service Center processing times and case status online: <https://egov.immigration.gov/cris/jsps/index.jsp>

Department of Labor processing times and information on backlogs:  
<http://www.ows.doleta.gov/foreign/times.asp>

Department of State Visa Bulletin: [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

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