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US IMMIGRATION & NATIONALITY LAW

GRIM SITUATION FOR EMPLOYMENT-BASED IMMIGRANT VISA AVAILABILITY

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by
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The Department of State Visa Bulletin for June 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4497.html, notes that the India Employment-Based Second Preference (EB-2) has retrogressed to January 1, 2000. The Employment-Based Third Preference (EB-3) for all countries of the world continues to remain unavailable. The June Visa Bulletin also states that the demand for numbers, primarily for adjustment of status cases at the USCIS offices, have been extremely heavy throughout the year. As a result, visa availability during the final fiscal quarter could become limited as categories approach their annual numerical limits. Therefore, the June Visa Bulletin further notes that visa availability throughout the remainder of the year cannot be guaranteed and the establishment of cut-off dates, or retrogression of existing cut-off dates, cannot be ruled out.

Charles Oppenheimer, who zealously controls the floodgates at Visa Office in the State Department, noted in an e-mail last Thursday to the editorial staff of BenderXs Immigration Bulletin regarding his predictions for July 2009 and beyond:

> TBased on current indications it will be necessary to retrogress the July China Employment Second preference cut-off date to January 1, 2000. (The India E2 category already retrogressed to that cut-off date for June). This will be done in an effort to hold number use within the overall Employment annual limit of 140,000. Should the combination of the China and India Employment Second preference retrogressions have more of an

> impact than anticipated, it is possible that those cut-offs could advance for September so that the worldwide limit would be reached.У

The situation truly remains grim. The EB-3 has been unavailable since May 2009. Even before the EB-3 became unavailable for India, the cut-off date had been hopelessly mired for the longest time in 2001. One glimmer of hope is that Senators Gillibrand, Kennedy and Schumer have introduced a bill, The Reuniting Families Act, which, among other things, will capture 400,000 family and employment unused visa numbers since 1992.

The silver lining, at least with respect to the H-1B count for Fiscal Year 2010, is that H-1B visas still remain available as of May 22, 2009. The USCIS indicated that approximately 45,700 H-1B cap subject petitions have been received. Also, USCIS has received approximately 20,000 petitions qualifying for the advanced degree cap exemption. The USCIS is thus continuing to accept H-1B petitions under both the regular 65,000 and the 20,000 advanced degree caps. This goes to show that quotas, with no economic foundation, do not control the demand for visas. It is best that market forces do the job. If the economy is booming, 65,000 are clearly insufficient. In recessionary times, a quota of 65,000 seems adequate, at least for now. However, it is reasonable to predict that the 65,000 H-1B quota will get used up well before the end of FY 2010. By then, hopefully, the economy may start to pick up and there will be no H-1B availability.

On the other hand, the misguided attacks on the H-1B visa have become more virulent. Senators Chuck Grassley (R-A) and Dick Durbin (D-IL) plan to introduce a bill that will further restrict the H-1B program and require all employers to recruit before they can petition for an H-1B worker. Companies dependent on H-1B workers may not be able to use the program any longer. Even Professor Ray Marshall, former Labor Secretary under the Carter administration, who is supported by organized labor (who have advocated for comprehensive immigration reform), is in favor of the disruption of the H-1B and L1 programs as they exist today. In his rebuttal to AILA (who criticized his attacks on the H and L programs), he surprisingly cites a report of John Miano of the Programmers Guild, http://www.programmersguild.com/. Visit their website and you will note that the GuildXs main purpose is to attack immigration. It does not focus on advancing the interests of its members by enhancing their skills through educational programs or inspiring them to be the founders of the next Google. The Programmers Guild is also in cahoots with NumbersUSA,

which has been called a hate group by the Southern Poverty Law Center, http://www.splcenter.org/intel/nativist_lobby.jsp. You can get a better feel of the debate between Professor Marshall and AILA by visiting Charles KuckXs blog posting, http://ailaleadership.blogspot.com/2009/05/continued-attacks-on-h-1b-and-l-1-visas.html

Fortunately, there are several credible studies that highlight the benefits of temporary work visas. For instance, The Heritage Foundation, http://www.heritage.org/Research/HomelandSecurity/wm2440.cfm, has stated that fears about the H-1B program are unfounded. The following extract from the report is worth quoting: TPreventing companies from hiring foreign workers will harm the US economyXs ability to rapidly adapt to marketplace demands. Companies must be able to hire persons best suited to fill positions based on their skill sets P not their nationality. People have varying skill sets unrelated to their country of residence. Simply requiring companies to hire American means that the company may not get the best qualified person or even the individual with the right set of professional skills to do the job. The federal government should not be making personnel decisions for American businesses.У

It is hoped that our elected representatives pay heed to the positive aspects of employment-based immigration, including the vital need for temporary nonimmigrant visas such as the H and L, which serve as useful bridges while people wait in line for permanent residency. Lastly, even advocates for immigrant reform, such as Professor Marshall, need to remember that not everybody desires permanent residency, and the H and L visas allow people, who choose not to emigrate, to remain in the US for temporary periods of time. An executive from France may wish to be in the US temporarily to fulfill an important assignment for the US subsidiary of a French company. He or she may not desire the green card as it may be an albatross around the neck if there is no intention to live in the US permanently. It would be rather paternalistic to stuff a green card down everybodyXs throat when a foreign national may choose to remain temporarily in the US to work or conduct business. Comprehensive immigration reform should include options for both permanent residency and temporary employment opportunities in the US.

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