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Immigration News

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No Joy This Season For Religious Workers



MANAGING PARTNER,
DAVID SWAIM

Over the past year, Citizenship and Immigration Services (CIS) has continued its attacks on various immigration categories including the H, L, O and E categories. But the religious workers category has received the worst abuse and the most unusual decisions.

There are two types of cases involving religious workers. The nonimmigrant or temporary case (R-1) is very similar in its requirements to the immigrant or permanent residence category (special immigrant). Both of these categories require a religious organization to offer a position to a religious worker who is either a minister, professional religious worker or the extremely vague "other religious worker." The religious organization must establish that it has received the tax exempt 501(c)(3) designation from the Internal Revenue Service and must also demonstrate that it has the funds available to pay the salary.

The difference between the two categories, other than the fact that one is temporary and one is permanent, is that the R-1 requires the applicant to show two years of membership in the denomination and the special immigrant or permanent category requires a showing of two years of full-time employment immediately prior to the application.

The CIS has focused on several issues in denying these cases. One issue is the religious organization's ability to pay the salary. Since religious organizations, which are exempt from filing taxes, do not have tax records to demonstrate income, this is a particularly troublesome area. In the past, the Immigration Service has not focused on this issue and it is unclear why the focus has changed. But the fact is that it has, and employers must be able to show sufficient financial resources to pay salaries to their religious workers, or the petition or application will be denied. Another issue which causes problems is the two-year employment requirement for the permanent residence religious worker. The employment

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The Good, The Bad & The Ugly

Changes in H-1B Processing



BY:
MAGGIE
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ATTORNEY
AT LAW

On October 1, 2003, the 2004 fiscal year began for the Citizenship & Immigration Services (CIS, formerly INS). With this new fiscal year brought major changes to H-1B application processing which will benefit employers wanting to hire foreign employees. However, in order to take advantage of these changes, employers must be aware of the sensitive timing and quota issues on the H-1B horizon.

THE GOOD

There is no better time than now for employers to sponsor H-1B employees.

As of October 1, 2003, there is no longer a mandatory \$1,000 filing fee for employers, which was formerly required when filing initial H-1B petitions and the first extension for each employee. The provisions which implemented this fee sunset on September 30, 2003, and currently, the Service has not been able to get Congress to reinstate the fee. However, this filing fee generated hundreds of thousands of dollars for the Service in recent years, so it is likely to be reinstated in the near future.

THE BAD

With every benefit there comes a “catch.” In this case, the second change that was ushered in with the new fiscal year goes hand-in-hand with the elimination of the filing fee. Because there is no longer a required employer filing fee, the amount of H-1B petitions which will be granted each year has been drastically reduced. The “quota” for H-1Bs has gone from 195,000 available per year to 65,000! So, if employers want to take advantage of filing with no mandatory employer fee, they must act quickly.

Based on past experience, we estimate that the quota will be reached by late spring/early summer of 2003. And, because it is typically taking an average of six months to get a petition approved by one of the local Service centers, H-1B petitions must be filed as quickly as possible. Of course, the Service has instituted a “Premium Processing” option, which ensures adjudication of nonimmigrant petitions within 15 days of filing. This service is an excellent option in many cases, but it comes with a price. The charge for premium processing is \$1,000. However, this price is often worth it to employers and employees, especially now, if it will ensure one of the limited numbers of H-1Bs available this year.

THE UGLY

We have noticed a trend in recent H-1B processing which suggests that the Service Centers are becoming very strict in their review of H-1B cases and in their application of the H-1B regulations. The result is an abundance of Requests for Evidence (RFEs) issued. No matter whether the case is a new H-1B case, an extension for a position for which an H has previously been approved on the same facts, or an amended H for a person who is

switching from one professional position to another, the Service Centers do not shy away from challenging cases these days, whether or not they are valid.

The challenges primarily fall within two categories: challenging the professional nature of the job and/or challenging the qualifications of the applicant for the job. In the first case, petitioners are required to establish that a four-year university degree is required for the position as “industry standard,” or that the employer has always required at least such a degree (or its equivalent) for the position. This requires a very careful analysis of industry standards for the position and/or employment records for prior employees in that position. The second challenge looks at the applicant’s qualifications to determine if that person qualifies for work in a specialty occupation. This challenge often surfaces in cases where foreign degrees or experience have been evaluated by university professors authorized to give college credit in the United States. A response to this type of challenge requires careful application of the regulations (because they are often misapplied by the Service in such challenges) and a detailed analysis of the validity of the professor’s evaluation.

Both types of challenges require detailed legal analysis to ensure that the case is approved. This stringent review of H-1B petitions is likely to last, especially if the quota for H-1B allocations remains so low. RFEs can add weeks, or even months, to H-1B processing, so expert review of cases prior to filing is essential.

These new changes in H-1B processing should make for a very interesting year ahead. Immediate processing should be considered; because, in a time of strict scrutiny, premium processing may make the difference between an approved H-1B and a qualified foreign applicant with no options for work authorization.



BY: *MAYA CUSTOVICH*
ATTORNEY AT LAW

DHS Suspends NSEERS Program Automatic Registration Requirement

The Department of Homeland Security has decided to suspend the National Security Entry/Exit Registration System (NSEERS) re-registration requirement that mandated nationals of selected countries to re-register after 30 days and one year of continuous presence in the United States. Previously, all individuals registered under NSEERS were required to re-register after thirty days if initially registered at a port-of-entry, and annually if they remain in the United States past one year.

Under the new rule, there will no longer be a 30-day or one-year re-registration requirement. In place of the automatic re-registration requirement, DHS has the discretion to determine whether an individual will be subject to additional registration requirements. This decision will be made on a case-by-case basis. For a small number of selected individuals, the re-registration may be more frequent than the 30-day or annual requirements under the prior rule.

DHS will notify the selected individual by mail to the last provided address, email, by in person delivery, or any other manner reasonably calculated to reach the individual. The selected person will have 10 days from the date DHS sends notice to comply with the re-registration obligation.

This rule does not change the requirement that individuals subject to NSEERS notify DHS of any change of address, employment and/or educational institution within 10 days of such change. The new rule does, however, eliminate the requirement for non-immigrant students subject to special registration who are also enrolled in the Student and Exchange Visitor Information System (SEVIS) to separately notify DHS of changes in education institutions and address.

It is important to note that students monitored under SEVIS must still notify DHS of any change of employment, which is currently not captured under the SEVIS system.

It is also important to note that the new rule does not change the general requirement that foreign nationals subject to NSEERS registration, either port-of-entry or future call-in registration, also report their departure from the United States. Failure to report departure could result in serious difficulties, such as inadmissibility for registered aliens who later attempt to return to the United States.

The new rule does clarify how certain individuals subject to NSEERS may apply for relief from registration departure requirements by seeking a waiver. Waivers may be granted at the discretion of the designated DHS official if the applicant establishes that exigent or unusual circumstances exist, and that the individual warrants a favorable exercise of discretion. Additionally, foreign nationals who are frequent visitors to the United States may be exempted at the discretion of the field office over the port to which the visitor most frequently arrives. The field office director or designee will determine, on a case-by-case basis, whether the frequency of arrival warrants relief from the registration requirements. Information regarding relief provisions, known as “walk away” materials, will be provided upon NSEERS registration and are also available on the web site <<http://www.ice.gov/>>.

As a final note, the new rule does not change any of the penalties for failing to comply with the special registration provisions. Furthermore, this rule does not excuse any prior failure to comply with special registration.



BY: BARBARA NELSON
SENIOR PARALEGAL

Immigration Updates

THE DEPARTMENT OF STATE (DOS)

DV Lottery 2005 – The new lottery program has been established. The procedures have changed drastically. You may want to give this information to your employees.

Entries must be submitted electronically and received between Saturday, November 1, 2003 and Tuesday, December 30, 2003. Applications received outside these dates are automatically disqualified. All DV-2005 Lottery entries must be submitted electronically at <http://www.dvlottery.state.gov>. **Paper entries will no longer be accepted.** The form must be completed in its entirety. If the form is not completed, the applicant's entry will be disqualified. No signature is required; however, new digital photos are required. Only one entry per applicant is allowed.

Persons born in the following countries are not eligible for DV-2005: Canada, China (mainland-born), Colombia, Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, South Korea, Vietnam, Russia and the United Kingdom (except Northern Ireland) and its dependent territories. Persons born in Hong Kong, Taiwan, Macau and Northern Ireland are eligible to apply.

Those selected will be notified by mail between May and July 2004. However, visas will not be issued until the next fiscal year (October 1, 2004 through September 30, 2005).

THE DEPARTMENT OF LABOR (DOL)

Unfortunately progress on cases at the SWA and DOL offices remains the same. DOL backlogs are increasing including the RIR cases. Significant delays are expected in several regions due to the volume and processing of H-2A cases. This is the heaviest time of the year for H-2 cases which requires immediate processing. This trend will continue to the end of 2003.

We are still awaiting the PERM regulations. Now it is anticipated that it may be published in early 2004. Once published, it would probably be effective 120 days after its publication. We will need to wait and see what happens.

Some good news – DOL is in the process of creating two backlog reduction centers – one in Dallas and the other in Philadelphia. These centers will be responsible for processing the older cases so that the extreme backlogs at the state level will be diminished. I hope this will help with the backlogs!

U.S. CITIZENSHIP AND IMMIGRATION SERVICES (CIS)

Yes, again we have a name change for this agency. First it was INS (Immigration and Naturalization Service); then it was BCIS (Bureau of Citizenship and Immigration Services); however, it has now changed to CIS (U.S. Citizenship and Immigration Services). I hope this is it!

The National Customer Service Center is experiencing problems with customer service. It seems that there is a breakdown in ability to obtain an answer to your inquiry. Even if a processing date is long past the date on the progress report, you can't get an answer as to what is the problem. Several members of Congress have sent an inquiry to CIS requesting information on this new center. Additionally, CIS is considering restoring some of the old phone services to obtain information on processing of cases.

Significant, unexplained delays are occurring with the I-131 (Advance Parole) applications. It is now taking six-to-seven months to process this type of case. File early to prevent problems with traveling. If you have a serious travel need and your case has been pending for over ninety days, contact our office. There may be assistance available to you.

Processing Times

BY: MINDY WOLFSON,
SENIOR PARALEGAL



Citizenship and Immigration Services Processing Times

CALIFORNIA SERVICE CENTER AS OF 11/14/03

I-140 - 03/20/2003 I-485 - 12/16/2001 I-765 - 08/11/2003 I-131 - 06/17/2003

NEBRASKA SERVICE CENTER AS OF 11/15/03

I-140 - 03/06/2003 I-485 - 08/24/2001 I-765 - 09/30/2003 I-131 - 09/30/2003

TEXAS SERVICE CENTER AS OF 10/15/03

I-140 - 01/29/2003 I-485 - 01/23/2001 I-765 - 08/22/2003 I-131 - 04/21/2003

VERMONT SERVICE CENTER AS OF 11/14/03

I-140 - 10/15/2002 I-485 - 01/15/2002 I-765 - 09/02/2003 I-131 - 09/08/2003

MISSOURI SERVICE CENTER AS OF 11/15/03

I-129F - 08/06/2003

State Employment Security Agency / Department of Labor Processing Times as of November, 2003

Texas SESA

Basic – 04/2001

RIR – 06/2003

California SESA

Basic – 04/2001

RIR – 12/2002

Illinois SESA

Basic – 04/2001

RIR – 07/2003

Texas DOL

03/2000

11/2002

California DOL

11/2002

08/2002

Illinois DOL

08/2002

09/2003

Oklahoma SESA

Basic – 04/2001

RIR – 02/2002

New York SESA

Basic – 03/2001

RIR – 04/2001

Oklahoma DOL

03/2000

11/2002

New York DOL

08/2003

11/2003

No Joy For Religious Workers: *Continued from page 1*

must be full-time and it must be immediately preceding the petition. Therefore, religious experience obtained many years ago or at any point prior to the immediately preceding two years will not be counted. Furthermore, the Immigration Service has been requiring a tremendous amount of documentation from the previous employers to document this experience. Since much religious work, such as missionary work, does not lend itself to the creation of documentation such as employment records, taxes, human resource records, etc., this can be a very difficult issue in these cases. Again, it is unclear why the Immigration Service has suddenly decided to make these issues the basis for denial, but nonetheless we must confront the reality that it is happening.

Almost all religious worker cases receive either a Request for Further Evidence (RFE) or a Notice of Intent to Deny prior to the actual denial. These notices are usually several pages long and contain numerous misstatements of the law, incorrect citations to appellate cases and other legal areas. They also usually contain dozens of requests for additional information most of which is irrelevant to the case. It is important when responding to these notices that the legal basis for the notice be challenged since it is most often wrong and that the appropriate requested evidence be provided as long as it is relevant to the case.

Many of the cases which have recently been denied are in the process of being appealed either within the Immigration Service or to Federal court. We anticipate that there will be much activity in this area over the next year. If you file a religious worker case, be prepared to address all of these issues when filing the case, and especially if you receive a Request for Further Evidence or a Notice of Intent to Deny. It is much better to win the case at the administrative level, if you can, rather than having to appeal. But for those individuals who do receive denials, the only choice is to fight these abusive tactics of the Immigration Service. ■



Happy Holidays

Front Row (l to r): Attorneys, Megan Raesner, Maggie Murphy, David Swaim (Managing Partner), Maya Custovich, Hugo Pina.

Middle Row (l to r): Barbara Nelson (Senior Paralegal), support staff: Jennifer Lowry, Grace Shyi, and Justina Wang (Financial Director).

Back Row (l to r) Jessica LeBeau, (Client Services) Amanda Stewart, (Paralegal) Shannon Bunch, (Paralegal) Jennifer Lee, (Executive Assistant) and Mindy Wolfson (Senior Paralegal).

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