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Why PERM May Be Illegal



INSIDE COMPASS

SEPTEMBER 2005

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After you have analyzed the job duties and established the employer's actual minimum requirements for the job, obtained the prevailing wage from the state employment commission and completed all of the recruiting steps, the final and crucial step in the PERM process is the filing of the application itself. Now the problems really begin.

The PERM application form is essentially an information gathering document. The vast majority of the information requested is readily obtained from the employer or the employee imposes no problem. However, Section H contains questions about the job and its requirements which are at best convoluted and illogical and at worst illegal. The main reason for these problems is the Department of Labor's misinterpretation of an appellate case referred to as Kellogg (Matter of Kellogg, 94-INA-465 February 2, 1998).

In this case, the Board of Alien Labor Certification Appeals (BALCA) held ... "that where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications in violation of §656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."

The Kellogg case represents a classic example of bad facts making bad law. The facts of the Kellogg and its companion cases dealt with the situation where the employers were stating their actual minimum requirements for the position and then including completely



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MANAGING PARTNER

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BY: LISA SOTELO
ASSOCIATE ATTORNEY

Your Drivers' License: **A REAL ID?**

On May 11, 2005, President Bush signed an \$82 billion dollar military spending bill called the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief. Encapsulated in that measure, was the controversial REAL ID Act, which purports to enhance national security through rigorous immigration provisions, including provisions that address the asylum process, judicial review, and terrorist activities. However, the drivers' license sections of REAL ID have received much of the media attention because of the significant impact they have on eligibility requirements and federally mandated license standards.

In fact, starting in 2008, if you live or work in the United States, you will be required to have a federally approved drivers' license to take advantage of almost any government service, open a bank account, collect Social Security payments, or travel on an airplane. The Department of Homeland Security (DHS) now has the authority to set the minimum standards for the drivers' licenses, which will include information such as name, birth date, sex, ID number, address, signature, a digital photograph, and a common machine-readable technology. The drivers' license must also be enhanced with physical security features designed to prevent

tampering, counterfeiting, or duplication for fraudulent purposes, and DHS reserves the authority to add additional requirements such as a digital fingerprint or retinal scan.

You will still obtain these licenses through your state motor vehicle agency; however, the identification process and eligibility requirements will be much more rigorous. Applicants will be required to provide a photo identity document that includes the person's full legal name, date of birth, and social security number (or verification that the person is not eligible for a social security number). The only foreign document that may be used for identification purposes is a passport. The REAL ID Act also requires each state to verify that the documents presented are legitimate, digitize them and retain both digital and paper copies of all documentation used to secure a license. This information will be shared in a national database that will allow states to access the motor vehicle records of any other state.

Applicants will also need to provide documentation proving that he or she falls into one of the following categories: (1) a citizen or national of the US; (2) an individual lawfully admitted for permanent or temporary residence; (3) has conditional permanent residence; (4) has an approved asylum application or has

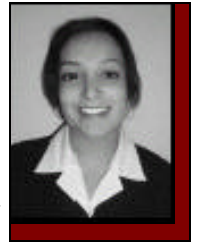


entered the US with refugee status; (5) has a valid, unexpired nonimmigrant visa or visa status for entry into the US; (6) has a pending asylum application; (7) has approved deferred action status; or (8) has a pending adjustment of status application. For those whose lawful status is pending or whose status is based on an expired visa, temporary drivers' licenses and identification cards will be issued with a validity period of one year or the expiration of the visa, whichever comes first. Those temporary licenses and identification cards may be renewed provided that the applicant can present documentation verifying that his or her status has been extended by DHS.

The implementation of the REAL ID Act will indirectly impose a duty on each state to enforce immi-

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STATUS ON THE H-1B CAP AND STRATEGIES FOR THE FUTURE



BY: INSIYA PATWA
ASSOCIATE ATTORNEY

In the past year, there have been many changes concerning H-1B Non-immigrants in the United States. One of the biggest changes was the H-1B Visa Reform Act of 2004 which added 20,000 new H-1B Visas for foreign workers with a minimum Master's Level Degree from a U.S. academic institution for Fiscal Year 2005. This number is in addition to the congressionally mandated annual cap of 65,000 H-1B Visas. The H-1B Visa Reform Act of 2004, which took effect on May 5, 2005, changed H-1B filing procedures for Fiscal Year 2005 and for future fiscal years.

As most people know, the current annual cap on the H-1B category is 65,000 for Fiscal Year 2006. As of the date of this article, there are no more H-1B H-1B visas available for Fiscal Year 2006. However, even though the United States Citizenship and Immigration Service had initially anticipated that there would be many employers and foreign workers seeking the new exemptions for the Master's or higher degrees, so far, approximately 9,500 out of the 20,000 visas are still remaining for Fiscal Year 2005.

It should be noted that foreign workers who are already in H-1B status who need an extension, or those individuals who work for university or non-profit organizations, are not subject to the cap and should not have any problems obtaining H-1B status.

The H-1B cap is a very important and sometimes a very

stressful issue for F-1 students who have already graduated and who are working on an Optional Practical Training (OPT). With the new changes this year and with the new exemption of 20,000 visas, the individuals who have graduated from a U.S. academic institution with a Master's Degree or higher will be eligible to apply under the exemption and will be able to start their employment right away once their H-1B



Petition is approved. But the cap issue raises a big problem for students who have not graduated with a Master's or higher degree from a U.S. institution and who have not yet applied for an H-1B visa. If the OPT of these students expires when there are no more visas available, the student has to make some decisions regarding his or her stay in the United States.

Individuals who are not able to obtain an H-1B visa before the

quota is met have a few options. One of the solutions to this problem is that the non-immigrant has to enroll in another degree program and enroll as a full time student. This would mean that the student will have to pay all the tuition and costs associated with the full-time course load and also receive an I-20 for enrolling in the program. Additionally, if the person is from Canada or Mexico, he or she can consider applying for a TN visa instead of an H-1B visa.

Furthermore, for the non-immigrants who did not make the H-1B cap this year can file for Fiscal Year 2007 as early as April 2006. These individuals can either go back home, apply in April 2006, and then come back to work in the United States, or they can enroll as a full time student and apply when the visa numbers become available again. In Summary, it is very important for students who have a Master's degree or higher from a U.S. academic institution and who have an offer of employment to file for an H-1B visa as soon as possible to take advantage of the numbers still available in the quota. For those individuals who have missed the quota this year, there are a few options available, as discussed above. If you would like to learn more about these options and how they would affect your future, please contact our office for a consultation.



BY: MEGAN RAESNER, ASSOCIATE ATTORNEY

NSEERS INFORMATION

FAILURE TO REGISTER:

The Kiss of Death?

In late 2002, the Immigration Service implemented a national registry for temporary foreign visitors, called the National Security Entry/Exit Registration System, or NSEERS. Male visitors 16 years or older from one of eighteen countries were required to submit to registration upon entry to the United States, or, if already present in the country, to attend a call-in registration at a designated immigration office. Although the call-in registration process has for the most part been suspended, the Immigration Service continues the NSEERS procedure at all ports-of-entry.

However, many of the individuals subject to the NSEERS requirement have failed to comply and are now feeling the impact of not having registered. This problem most often arises when applying for a benefit from the Immigration Service, such as an extension or change of nonimmigrant status, an employment authorization document, or adjustment of status to that of permanent resident.

In such cases, the Service Center or District Office adjudicating the application will issue a Request for Evidence, seeking proof of NSEERS compliance, which would be in the form of a stamp in the passport and on the I-94 card. If an applicant did not attend registration, the Immigration Service has not been denying the requested benefit immediately, but has been scheduling those individuals for an interview. At the

interview, the applicant will experience a bifurcated process. First, he meets with a duty officer, who will assess the reasons why the applicant failed to present himself for NSEERS. If the applicant can demonstrate that his non-compliance was reasonably excusable or not willful, then the duty officer will refer him to an NSEERS officer, who will then register the applicant and stamp his passport. The Request for Evidence can then be answered, and processing of the application will continue.

On the other hand, if the duty officer were to find that the failure to register was willful or not reasonably excusable, such a determination will be a significant factor in determining whether to grant or deny the sought-after benefit. Because compliance with NSEERS is a condition of nonimmigrant admission, failure to adhere to this requirement makes an individual ineligible for nonimmigrant status benefits and will thus result in a denial of a change of status or extension of status application. For those individuals seeking permanent residence, if they are not otherwise excused from maintaining nonimmigrant status, such as an immediate family member or an applicant protected by 245(i), a registration violation will likewise result in a denial of the adjustment of status application. Even in the case of an immediate relative or person protected by 245(i), the Immigration Service has indicated that failure to comply with NSEERS

could still result in a denial of adjustment of status as a matter of discretion.

However, it is important to note that the failure to register should not affect the processing of the underlying petition, i.e. the I-130 Relative Petition or the I-140 Immigrant Worker Petition. As registration bears no relevance on whether a family or employer relationship is bona fide, the Immigration Service should adjudicate the I-130 or I-140 petition independently of the registration consideration. Once the underlying petition is approved, the adjustment of status application would then be denied for failure to register, affording the applicant with no other option but to take his approved petition and pursue consular processing. Once the applicant leaves the country to consular process, not only could he be subject to various reentry bars, but the noncompliance with the registration procedures could still be used as a factor by the American Consulate in determining whether to issue the immigrant visa.

In summation, noncompliance with the registration requirement constitutes a failure to maintain nonimmigrant status and could subject an individual to criminal penalties, removal proceedings, or the denial of immigration benefits. It is therefore very important to contact an attorney if you have any questions or concerns regarding the NSEERS process. ■



BY: CLAUDIA WILLIAMS
ASSOCIATE ATTORNEY

Congress Changes L-1s Again

On December 8, 2004, the President signed into law the Omnibus Appropriations Act (OAA). Among the provisions of the OAA is the L-1 Visa Reform Act of 2004. The L-1 Visa Reform Act makes two significant changes to the L-1A classification. By way of background, the petitioner for an intracompany transfer must be a firm, corporation, or affiliate seeking to transfer a foreign employee to the United States temporarily from one of its operations outside the United States. The petitioning employer must be actively engaged in providing goods and/or services in the United States and abroad, either directly or through a parent, branch, subsidiary, or affiliate, with employees in both countries, for the duration of the beneficiary's stay. The transfer of such vital personnel enables international companies to expand their US-based operations, which results in more opportunities for US workers.

The first significant change relates to L-1Bs who are nonimmigrant workers who are eligible for the L-1 Visa based on their "specialized knowledge." The purpose of the change is to address the "outsourcing" of L-1B temporary workers. L-1B temporary workers can no longer work primarily at a third party worksite if the work is controlled and supervised by a third party employer. USCIS will interpret "control and supervision" to require an L-1B petitioning employer to retain ultimate authority over the worker. Employers are also prohibited from placing L-1B temporary workers at the third party site if the placement is not in connection with specialized knowledge of the specific product or service of the petitioning employer. This new ground of ineligi-

bility applies to all petitions filed on or after June 6, 2005, and includes petitions for initial, amended, or extended L-1B classifications.

The second significant change effected by the statute involves the qualification requirements for L-1 intracompany transferees covered by a blanket petition. The blanket petition program allows a petitioner to seek continuing approval or itself, its parent, and its branches, subsidiaries, and affiliates as qualifying organizations and, later, classification of any number of beneficiaries employed by itself, its parent, or some of its branches, subsidiaries, and affiliates. To qualify for the L-1 Visa, the beneficiary must have been employed abroad by the petitioner for a period of 12 months in the previous three years as a manager, executive, or specialized knowledge professional. This section of the new law applies only to "initial" petitions filed after June 6, 2005; extensions of status under the blanket program are not affected by this new provision.

All employers of workers in L status are required to pay \$500 anti-fraud fee for petitions filed or visas under a blanket L as of March 8, 2005. The fee will apply to employers filing an initial petition for an L visa. The fraud fee will also be charged for a beneficiary filing a visa application abroad for an L blanket petition. Other than petitions to amend or extend stay by an existing L employer, there are no exemptions from the \$500 fee.

This fee is in addition to the base processing fee of \$185 to file a Petition for a Nonimmigrant Worker and any premium processing fees, if applicable.



*(Why PERM May Be Illegal,
Continued from Page 1)*

requirements which were tailored specifically for the alien. In fact, in another part of the opinion, the BALCA clearly states that if an employer lists alternative requirements which are in fact legitimate for the position and are equal to the primary requirements, they are not considered to be "permissive" and therefore we do not have to go through the analysis of whether any "suitable" requirements may be used. Unfortunately, the Department of Labor in creating the PERM program chose to ignore this part of the decision and therefore has made the "suitable" language a requirement on the application.



The PERM regulations specifically state that if the employer provides for an "alternative" job requirement other than the job offered, then the statement that "any suitable combination of education, training or experience is acceptable" must be included on the application. First, it must be noted that in order to comply with this regulation the employer must actually type the language on the application because it does not appear anywhere on the form. Second, as BALCA held in Kellogg, it should not be required when the alternative requirement is consistent with the primary requirement and the two are equal.

For example, assume the position is a Software Developer II which uses C++ to develop software. The employer's primary requirement is

a bachelor's degree and two years of experience in the job offered or the employer will accept a bachelor's degree and two years of software development experience including C++. In other words, the applicant for the job does not have to have experience in a job which has a title of Software Developer II. The applicant simply must have two years of experience in software development using C++.

This is traditionally how labor certification cases have been processed and is permissible under the analysis used by BALCA in Kellogg.

Unfortunately, the Department of Labor in creating a PERM application has thoroughly confused these issues. For example, in order to complete the form properly, the employer still must state that "any suitable combination" of education and experience would not be the actual requirements for the job.

The reason this is so important is because U.S. applicants who submit their resumes during the recruiting process may have a wide variety of backgrounds which are somewhat related to software development. If an applicant has twelve years of software development experience but no degree, is that individual qualified for the position? If the employer requires a college degree for the position, can the Department of Labor force the employer to accept an individual who although having many years of experience does not possess a college degree? In effect, the entire PERM process comes down to the

interpretation to the word "suitable".

We will see how these issues are addressed by the Department of Labor as we continue to file cases and to see responses. Unfortunately, the PERM application itself forces the employer to make statements which are incorrect as a matter of fact and most probably violate the holding in Kellogg.

*(Your Drivers License: Real ID?
Continued from Page 2)*

gration laws costing states millions of dollars. Hundreds of civil liberties groups, immigrant support groups, and government agencies have opposed the Act arguing that it is costly, punishes undocumented immigrants, and creates a de facto national ID card. However, in spite of the widespread opposition, REAL ID is now the law and until lawsuits brought against it are successful, everyone applying for a drivers' license will need to adhere to the new requirements.

LABOR CERTIFICATION INFORMATION

*By: Amanda Stewart, Paralegal
and Shannon Bunch, Paralegal*

As of December 2004, all pending Labor Certification cases at the State Employment Security Agencies (SESAs) began shipping to the Federal Department of Labor (DOL) Backlog Reduction Centers located in Philadelphia and Dallas. As of February 4, 2005, 90,000 cases were shipped/forwarded to these Backlog Reduction Centers, the second and third phases of these shipments to the Backlog Reduction Centers have yet to be completed. The Department of Labor has set up an e-mail system that will enable a party to find out whether their case has been transferred to the Backlog Reduction Center. The e-mail address for the Dallas Center is h1b7yr@dal.dflc.us and h1b7yr@phi.dflc.us for the Philadelphia Center. When making a request, please be sure to include the employer name and address, employee name and address, date of filing, state where filed and case number if known.

VISA AVAILABILITY UPDATES

By: Mindy Wolfson, Senior Paralegal

Continued heavy applicant demand for numbers in most categories has resulted in October cut-off dates, which are earlier than those that prevailed for Mexico during most of FY-2005. Many categories have become oversubscribed for October, and cut-off dates established due to continued heavy demand for numbers by CIS for adjustment of status cases. Forward movement of the cut-off dates in these categories is likely to be limited.

On the Visa Availability Bulletin located on the back cover, the listing of a date for any class indicates that the class is oversubscribed; "C" means current, i.e., numbers are available for all qualified applicants; and "U" means unavailable, i.e., no numbers are available. Note that numbers are available only for applicants whose priority date is earlier than the cut-off date listed on the bulletin.

**U.S. CIS
PROCESSING TIMES****CALIFORNIA SERVICE CENTER
AS OF SEPTEMBER 20, 2005**

I-140 - 05/02/2005
I-485 - 05/02/2005
I-765 - 08/22/2005
I-131 - 08/22/2005
I-129 - 07/17/2005

**NEBRASKA SERVICE CENTER
AS OF SEPTEMBER 20, 2005**

I-140 - 03/01/2004
I-485 - 06/01/2004
I-765 - 07/20/2005
I-131 - 07/20/2005
I-129 - 06/27/2005

**TEXAS SERVICE CENTER
AS OF SEPTEMBER 20, 2005**

I-140 - 07/06/2005
I-485 - 01/03/2005
I-765 - 08/22/2005
I-131 - 08/27/2005
I-129 - 07/15/2005

**VERMONT SERVICE CENTER
AS OF SEPTEMBER 20, 2005**

I-140 - 03/26/2005
I-485 - 09/23/2004
I-765 - 06/25/2005
I-131 - 06/25/2005
I-129 - 04/30/2005

**NATIONAL BENEFITS CENTER
AS OF SEPTEMBER 20, 2005**

I-129F - 08/16/2005

VISA AVAILABILITY BULLETIN

October 2005

| | <i>All Chargeability Areas Except Those Listed</i> | <i>China Mainland Born</i> | <i>India</i> | <i>Mexico</i> | <i>Philippines</i> |
|---------------------------------------|--|--------------------------------|--------------|---------------|--------------------|
| <i>Family Preferences</i> | | | | | |
| 1st | 04.22.01 | 04.22.01 | 04.22.01 | 01.01.93 | 05.22.91 |
| 2A (Exempt from per country limit) | 11.01.01 | 11.01.01 | 11.01.01 | 10.01.98 | 11.01.01 |
| 2B | 04.22.96 | 04.22.96 | 04.22.96 | 12.01.91 | 04.22.96 |
| 3rd | 04.15.98 | 04.15.98 | 04.15.98 | 01.01.93 | 11.08.90 |
| 4th | 02.01.94 | 02.01.94 | 08.01.93 | 02.01.91 | 05.01.83 |
| <i>Employment Preferences</i> | | | | | |
| 1st | C | 01.01.00 | 08.01.02 | C | C |
| 2nd | C | 05.01.00 | 11.01.99 | C | C |
| 3rd | 03.01.01 | 05.01.00 | 01.01.98 | 01.01.01 | 03.01.01 |
| 4th | C | C | C | C | C |
| Schedule A Workers | C | C | C | C | C |
| Other Workers | 10.01.00 | 10.01.00 | 10.01.00 | 10.01.00 | 10.01.00 |
| Certain Religious Worker | C | C | C | C | C |
| 5th | C | C | C | C | C |
| Targeted Employment Areas | C | C | C | C | C |

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