

**** THE PROBLEMS FACING EMPLOYMENT-BASED IMMIGRATION ****

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by

*Kristen A. Chang and David J. Long
Long, Chang & Associates, L.L.P.
4915 Piedmont Parkway, Suite 103
Jamestown, NC 27282
Phone: (336) 855-5700
www.longchangoonline.com*

The employment-based immigration system took two severe hits on August 11-12. First, on August 11, 2005, the Department of State issued the Visa Bulletin for September 2005 which indicated that potentially-severe backlogs are likely in coming months for the employment-based 3rd preference immigrant visa category for all countries. Secondly, the H-1B visa cap was unexpectedly reached on August 10, 2005, meaning that no new H-1B visas are available in cases subject to the cap until October 1, 2006 (more than 15 months from now). This article analyzes these two new problems in employment-based immigration.

September 2005 Visa Bulletin Announces Expected Backlogs

First, in that Visa Bulletin, the Department of States announced the following:

The backlog reduction efforts of both Citizenship and Immigration Services, and the Department of Labor continue to result in very heavy demand for Employment-based numbers. It is anticipated that the amount of such cases will be sufficient to use all available numbers in many categories. As a result cut-off-dates in the Employment Third preference category will apply to the China, India, and Philippines chargeabilities beginning in October, and it is possible that Mexico may be added to this list. In addition, it is anticipated that heavy demand will require the establishment of a Third preference cut-off date on a Worldwide basis by December.

The amount of Employment demand for applicants from China and India is also likely to result in the oversubscription of the Employment First and Second preference categories for those chargeability areas. The establishment of such cut-off dates is expected to occur no later than December.

The level of demand in the Employment categories is expected to be far in excess of the annual limits, and once established, cut-off-date movements are likely to be slow.

To read the Visa Bulletin in its entirety, please see http://travel.state.gov/visa/frvi/bulletin/bulletin_2616.html.

As readers of www.longchangoonline.com are aware, the Department of State has hinted in recent months that backlogs or visa unavailability in certain employment-based

categories was possible. The September 2005 Visa Bulletin issued by the Department of State confirms that fact and is the first official announcement concerning this growing problem.

For the past several years, there were plenty of employment-based visas available in each of the employment-based categories. In just the past several months, visa have either become totally unavailable for certain employment-based immigration categories or unavailable for cases with a priority date later than a cut-off date established by the Department of State. The unavailability of visas was first felt by nationals of India, China and the Philippines since the demand for visas from individuals from these countries has exceeded the annual visa limits in certain employment-based categories. However, the announcement in the September 2005 Visa Bulletin is a warning that the unavailability of visa numbers or the number of employment-based visa categories with cut-off dates is expected to grow and is expected to last a long time.

The reason for this problem is two-fold:

(1) The law provides that only a limited number of visas be issued in any particular employment-based immigration category. The limits are far too low. The demand for visas has now far exceeded the number of visas available in any given year.

(2) The demand for employment-based immigration visas has grown dramatically as a result of the USCIS backlog reduction efforts and the faster processing of labor certification cases under the new PERM labor certification system. USCIS has been concentrating on approving green card application in employment-based cases. As each case is approved, another visa number is used up. As a result, the faster the employment cases are processed, the faster the limited number of employment visas is being used up. In addition, the Department of Labor has been issuing approved labor certifications at a faster rate under the new PERM system. With more cases being approved at a faster rate, more individuals have been applying for green cards based on these approved labor certifications. Thus, PERM, which was once hailed as a significant improvement to the immigration system, is now in fact contributing to the problem of visa unavailability or backlogs.

H-1B Cap Reached

On August 12, 2005, the USCIS unexpectedly announced that all H-1B visas have been used up for fiscal year 2005 (October 1, 2004 to September 30, 2005). For a copy of the USCIS announcement, please see http://uscis.gov/graphics/publicaffairs/newsrels/H-1Bcap_12Aug05.pdf.

In the past, USCIS typically would provide a warning when H-1B visas were expected to run out. This warning would be announced at least several days before the H-1B visas were expected to run out. Unfortunately, USCIS made no such announcement this year.

As readers of www.longchangoonline.com are aware, the H-1B visa cap is set at 65,000 per year. However, that number is higher than the actual number of visas available. The 65,000 cap is reduced by 6,800 (the number of visas set aside under special legislation for individuals from Chile and Singapore). As result, the actual cap is only 58,200.

The USCIS announcement states that as of August 10, 2005, it had received enough cases to reach the H-1B cap of 58,200. This means that, for those cases which are subject to the cap, no new cases can be approved for employment starting before October 1, 2006 (almost 15 months from now). The only H-1B cases that can be approved before then are cases which are not subject to the cap (such as extensions or amendments to existing H-1B cases). In addition, as of the date of this writing, there are still H-1Bs available for individuals who have graduated from a U.S. university with an advanced degree (masters or Ph.D.).

Summary

With these two negative developments in mind, it is apparent that the U.S. Congress must reform our broken immigration system. It is time for comprehensive immigration reform that will increase the number of employment-based immigrant and non-immigrant visas.

Kristen A. Chang and David J. Long are attorneys in the immigration law firm of Long, Chang & Associates, L.L.P. Ms. Chang and Mr. Long are members of the North Carolina State Bar and the American Immigration Lawyers Association (AILA). Mr. Long has been certified by the North Carolina State Bar as a Specialist in Immigration Law. They may be reached via telephone at (336) 855-5700 or via e-mail at info@longchangoonline.com

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