

Thursday, May 24, 2007

Immigration Update: Jump in Priority Dates Shown in June 2007 Visa Bulletin

By Matthew J. Martinez

“Green Card” Priority Dates Make Huge Leap

Finally, good news for employment-based “green card” applicants. The U.S. Department of State [DOS] just issued its June 2007 Visa Bulletin, which summarizes the availability of immigrant visas each month, and it is showing a major leap in priority dates for certain preference categories. Priority dates are established on the date the labor certification application is filed, or if none is required, the date the I-140 Immigrant Worker petition is filed. The beneficiary of an I-140 petition whose priority date is “current” is eligible to immediately file his or her personal application for permanent residence, “adjustment of status,” on the USCIS form I-485.

Priority dates for the third preference (EB-3) skilled worker and professional category advanced by 2 years to June 1, 2005 for worldwide and Philippines chargeability areas, and to June 1, 2003 for China, India and Mexico.

Priority dates for the second preference (EB-2) category advanced to January 1, 2006 for China, and to April 1, 2004 for India. All other countries are current.

The EB-3 “other worker” category, which became “unavailable” in last month’s bulletin, is again available for applicants with priority dates before October 1, 2001, but will become unavailable once again beginning in July, and will remain so for the remainder of Fiscal Year 2007.

The DOS indicates that these significant advances in priority dates are the result of lower demand in the employment-based categories, and it appears likely that there will be additional advances during the coming months. However, DOS cautions that priority date movement in these amounts may lead to excessive demand for available visas, which could again result in priority date retrogression.

Accordingly, employees in the “green card” process with newly current priority dates are eligible to apply for permanent residence immediately. If the employer has not yet filed the I-140, it can be filed concurrently with the employee’s I-485. Given the instability of these dates, both employer and employee should act quickly. Remember, filing the I-485 allows most applicants and their family members to request travel permits and work authorization. The ability to obtain a travel permit is especially valuable and it removes the necessity of keeping visas current.

Please contact us to determine whether your employees’ priority dates are current, and to assess the appropriate next steps.

To access the June 2007 Visa Bulletin, click on the following link:

http://www.travel.state.gov/visa/frvi/bulletin/bulletin_3236.html

quick links

- Immigration Attorneys
- Immigration Practice
- Labor and Employment Attorneys
- Labor and Employment Practice
- All Fennemore Craig Updates
- Contact Us
- Acrobat Reader

Phoenix
3003 N. Central Ave.
Suite 2600
Phoenix, AZ 85012-2913
(602) 916-5000

Tucson
One S. Church Ave.
Suite 1000
Tucson, AZ 85701-1627
(520) 879-6800

Nogales
420 W. Mariposa Rd.
Suite 200
Nogales, AZ 85621-1074
(520) 281-3480

Las Vegas
300 S. Fourth St.
Suite 1400
Las Vegas, NV 89101-6021
(702) 692-8000

Denver
1700 Lincoln St.
Suite 2625
Denver, CO 80203-4500
(303) 291-3200

Now is the Time to Apply for H-2B Visas

Employers looking to hire foreign, temporary workers to fill their seasonal or peak load needs should begin preparing their applications for H-2B visas as soon as possible. The earliest date such visas can be applied for is June 1, 2007, which is 120 days prior to the first available start date of October 1, 2007. Only 66,000 new H-2B visas are granted each year: 33,000 will be granted for workers whose start dates fall between October 1, 2007 and March 31, 2008, and the remaining 33,000 will be reserved for workers needed from April 1, 2008 to September 30, 2008. Fortunately, this cap only applies to first-time H-2B workers - returning H-2B workers (those who have worked on an H-2B in any of the preceding three years) are exempt.

The H-2B visa is available to employers of foreign workers not working in the agricultural field, and specifically for work that is temporary in nature. For H-2B purposes, this means: recurring seasonal need, intermittent need, peak-load need, and need based on a one-time occurrence. A job opportunity is considered temporary as long as the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary.

The employer must also prove that there are no unemployed US workers willing or able to do the work, which is accomplished through a labor certification process under the guidance of the Department of Labor. This process requires a recruitment campaign, including advertising in a local newspaper for available temporary workers.

The length of the stay on an H-2B visa is limited by the duration of the employer's temporary need for additional workers. The maximum authorized period of stay is one year, and the visa may be extended for a total of three years. However, extension applications are closely scrutinized.

The DOL has been taking longer than usual to certify labor certification applications in recent months, so if you are planning on utilizing the H-2B program to fulfill fall labor needs, you should consider getting started soon.

DOL Issues New Rule on Labor Certification Validity

Employers take note: after July 16, 2007, you will have 180 days to use an approved labor certification for a substituted employee. In an effort to enhance program integrity and reduce what the DOL believes are "incentives and opportunities for fraud and abuse" related to the permanent employment of aliens in the United States, the Department of Labor has published a new rule, to be effective on July 16, 2007, which will apply to permanent labor certification applications and approved certifications filed under both PERM and pre-PERM procedures.

Some of the major provisions of the rule provide for the following changes:

- 180-day validity period for approved labor certifications:
 - a) All labor certifications approved on or after the July 16, 2007 effective date must be filed in support of a Form I-140 petition with USCIS within 180 calendar days of the labor certification's approval date.
 - b) All labor certifications approved prior to the July 16, 2007 effective date must be filed in support of a Form I-140 petition with USCIS within 180 calendar days after July 16, 2007.
- Prohibition on the substitution of beneficiaries on permanent labor certification applications and resulting certifications.
- Prohibition on the sale, barter or purchase of permanent labor certifications.

Need to Know

- Requirement that employers pay the costs of preparing, filing and obtaining certification. Specifically, an employer cannot transfer the costs incurred in the labor certification application process to the employee. Although, the employee may pay his or her own “legitimate costs” in the labor certification process, including personal attorneys’ fees, the DOL has not provided examples of what those “legitimate costs” might be, nor can we.
- Reinforcement of existing law regarding the submission of fraudulent or false information and clarification of current DOL procedures for responding to incidents of possible fraud.
- Establishment of procedures for debarment from the permanent labor certification program.
- Clarification of the “no modifications” policy for PERM applications.

Update on Comprehensive Immigration Reform

As you have probably seen or heard on the news, Comprehensive Immigration Reform is again being debated by the Senate. At this point, there have been no changes to our current immigration laws, and we do not know if anything will come of this recent activity. We will continue to monitor this topic closely, and we will of course alert you to any significant developments as they occur.

Matthew J. Martinez focuses his practice in the area of immigration and nationality law, with an emphasis on corporate transfers, professionals, entrepreneurs, investors, entertainers and athletes. Mr. Martinez has extensive experience representing employers and athletes in the equine industry, and in obtaining visas for temporary and seasonal workers. He earned his B.S., (1995) and his J.D., (1999) from Brigham Young University.



Matthew J. Martinez
Associate
602.916.5446
mmartinez@fclaw.com



Nancy-Jo Merritt
Director
602.916.5411
nmerritt@fclaw.com