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USCIS Fraud Investigations of Religious Workers Cause Problematic Delays

As previously reported in Immigration Newswire, USCIS is conducting a massive fraud investigation into religious worker visa fraud after an audit which revealed a high rate of fraud in these petitions. Our office noticed a dramatic slow down in R-1 and I-360 processing in the months preceding USCIS's announcement of the fraud investigations. A few of our I-360 Religious Worker petitions have been pending for approximately one year now (since last March), and there is no end in sight to the delay. USCIS sent out boilerplate Requests for Evidence on *all* pending I-360 petitions in December 2006, and while many attorneys have submitted responses to these RFEs, none report that these I-360 petitions are being adjudicated. The longer these delays extend, the more religious workers are going to be placed in an impossible situation which may force them to leave the U.S. and wait abroad while their I-360s are adjudicated. There is a similar stand-still in R-1 adjudications, although boilerplate RFEs have not been sent out on these petitions.

In recent minutes between the American Immigration Lawyers Association and the USCIS Nebraska Service Center, USCIS stated:

Subsequent to the benefit fraud assessment the agency conducted, we received a directive that *no religious worker petition* could be adjudicated without a site visit having been performed. Therefore, we are unable to take any action on these long-pending cases until the site visit has been completed.

(Emphasis added).

This means that USCIS investigators must appear at every religious organization to conduct an investigation before it can issue a decision on either an I-360 immigrant religious worker petition or an R-1 nonimmigrant religious worker petition. This is likely to dramatically slow down adjudications. To date, only one of our clients has received a site visit, and it was for an R-1 extension petition that had been pending for seven months. Approximately 45 days after the site visit, a decision was finally issued.

I-360 Adjudications Delays: Problems and Possible Solutions

Most religious workers enter the U.S. in R-1 nonimmigrant status and if they decide to pursue permanent residency, later file I-360 petitions as the first step in becoming permanent residents. R-1 status is valid for an initial period of three years and can be extended for one additional two-year period, for a maximum period of stay of five years. Religious workers must maintain their R-1 nonimmigrant status during the entire period

that the I-360 petition is pending. (Once the I-360 is approved, they can apply for adjustment of status and a separate Employment Authorization Document based on the pending adjustment of status application). It used to be that I-360s were adjudicated within a few months, but the recent, unexpected and very lengthy delay in adjudication of I-360s means that some religious workers will not have enough time left on their R-1s to remain in the country while the I-360 adjudication is completed.

Some religious workers currently in R-1 status may be eligible for H-1B status, if they possess a U.S. Bachelor's Degree or its equivalent in a foreign degree and/ or experience; and if their employers require that degree for entry level positions in the occupation. The employer would also need to be able to pay the beneficiary the prevailing wage for the occupation, which is often higher than what religious workers make. Changing status from R-1 to H-1B requires careful planning in order to come under the H-1B cap imposed by Congress (see our article explaining the H-1B cap at http://www.usvisahelp.com/art_h1bcap.html). While changing status to H-1B will allow some religious workers to remain in the U.S. long enough to see their I-360 petitions adjudicated, not all R-1 beneficiaries will qualify for an H-1B. There may very well be several religious workers with no legal options for remaining in the U.S. while I-360 adjudications drag on.

Another possibility would be for religious workers' employers to file labor certifications and I-140 petitions on their behalf in addition to the pending I-360 petitions. This is a costly proposition, however, and there are probably few religious workers for whom this is a real option. A labor certification requires that the employer place several advertisements for the religious worker's job to test the labor market. If any qualified, willing, and available U.S. workers apply for the job, the case cannot go forward. Not only are the advertisements expensive (e.g. two Sunday ads are required in a large newspaper), but the employer must also pay the religious worker the prevailing wage upon the granting of his permanent residency. The employer must document ability to pay the wage in the form of federal income tax returns or audited financial statements, which many tax-exempt religious organizations do not have. Where a religious organization has over 100 employees, however, USCIS may accept the attestation of an officer of the organization that the company has the ability to pay the proffered wage.

Even if a religious worker does get a labor certification and I-140 petition approved, there will still be a delay before a visa number becomes available, unless the religious worker has the equivalent of a U.S. Masters Degree and the job requires that degree. Obviously, given the difficulties involved with a labor certification and I-140, this is not a sure-fire solution for every religious worker. However, there may be some situations in which this works out to the advantage of the worker. These options should be discussed with an immigration attorney before proceeding, as the unique facts of each case must be considered before choosing the appropriate strategy.

R-1 Adjudication Delays: Problems and Possible Solutions

Another problem is caused by the delay in R-1 extensions. If an R-1 beneficiary has applied to extend her stay with the same R-1 employer that sponsored the first R-1, the beneficiary is entitled to 240 days of employment authorization by regulation, following expiration of the previous R-1. Employment authorization ends when the extension of stay is approved or denied. If the adjudication takes longer than 240 days, the beneficiary is permitted to remain in the U.S. as long as the extension request is pending, without accruing unlawful presence. However, she is not legally permitted to work. In many cases, this leaves R-1 beneficiaries unable to renew their driver's licenses as well. It used to be that the R-1 beneficiary could speed up processing by paying an extra \$1000 for premium processing (which guarantees adjudication within 15 days), but USCIS has done away with premium processing for religious workers since it began conducting the fraud investigations.

Fortunately, religious workers are not required to have USCIS approve an R-1 petition on their behalf in order to extend their stay. They have the option of leaving the U.S. and reentering in order to get a new period of R-1 admission authorized. For most individuals, this means obtaining an R-1 visa from a U.S. consulate abroad, which entails often expensive foreign travel and accommodations. However, for those R-1 nonimmigrants whose R-1 visas are still valid just prior to expiration of their current R-1s, it may be possible to leave the U.S. and reenter on the visa just before it expires, and be readmitted for an additional 2-year period. Customs officers are supposed to admit religious workers for the total authorized period of stay, regardless of whether the visa itself is about to expire. Canadian citizens are not required to have visas, and would just need to leave the U.S. and reenter with a new R-1 application to be presented at a port of entry. Individuals considering these options should consult with an immigration attorney to determine which option is most strategically viable given the facts of their case.

For those R-1 nonimmigrants still within their first three years, it is best to file the R-1 extension as early as possible. Form I-129 instructions now permit all petitions to be filed six months in advance of the expiration date of the previously authorized period of stay. It would be best to file the R-1 extension six months before the old R-1 expires. This gives the beneficiary six more months on his current R-1 status, plus an additional 240 days of employment authorization after his current R-1 expires. This leaves the greatest chance that the beneficiary will not be forced to stop working while waiting for an extension of stay to be approved, or to leave the U.S. and reenter in order to receive an additional 2-year R-1.

H-1B Filing Season: Making It Under the Cap & Other Issues

As this year's H-1B cap opens up, H-1B employers and immigration attorneys all around the country are scrambling to get H-1B petitions ready to file by April 2. (April 1 is technically the first date new petitions can be filed, but April 1 falls on a Sunday this year, so April 2 is the real first filing date). To use one of President Bush's favorite words, the "chatter" in the immigration law community seems to indicate that the H-1B cap will be reached in record time this year. This is logical, given that the cap has been

reached earlier and earlier every year since the cap was reduced to 65,000. This trend seems to have so primed employers and their attorneys to file new H-1B petitions in a timely manner that anyone who drags their feet on filing (or, ahem, getting documents to their immigration attorney) is going to be sorely disappointed when they miss the cap.

Short-Sheeting the LCA

One thing employers and attorneys are doing is filing the Labor Condition Application (LCA), which must be submitted with the H-1B petition, early. The LCA is filed electronically with the Department of Labor and can only be filed within 6 months of its first validity date. For those who wish to have their H-1B petitions mailed to USCIS on Friday, March 30, and received on the first filing date of Monday, April 2, this presents a problem. If the start date of the LCA is October 1, which is the first day H-1B employment can start, the earliest the LCA can be filed is April 1. This will not get the H-1B petition to USCIS until April 3 at the earliest, and possibly not until the 4th or 5th due to the time involved in shipping documents off to the employer for signature and getting them back to the attorney's office to then submit to USCIS. So, many employers and attorneys are doing what I have termed "short-sheeting the LCA." For example, if an employer files an LCA online on March 8, the latest start date for the LCA is six months later, or September 8. The I-129 form would still have to request that the H-1B employment start date be October 1 or later, but there is no requirement that the LCA validity dates begin on or after the H-1B start date. Therefore, if the LCA is valid from September 8, 2007- September 8, 2010, the requested validity dates for the H-1B petition would have to be October 1, 2007- September 8, 2010. The net result is that the beneficiary forfeits a few weeks of H-1B time in exchange for relative assurance that the petition will be filed under the cap.

Maintaining Status Until October 1

For those who are already in the U.S. and seek a change of status to H-1B, it is vital that they maintain their current nonimmigrant status until October 1 in order to remain eligible for a change of status. This may be particularly difficult for F-1 students currently on Optional Practical Training (OPT) which will expire before October 1. USCIS has previously issued cap-gap legislation to forgive this lapse of status, but cap-gap legislation has not been enacted for the past two years and there has not yet been any indication that it will be passed this year. In a January 24, 2007 meeting between AILA and the Vermont Service Center, VSC officials stated that if there is a mere one day gap between expiration of the 60-day OPT grace period and October 1, VSC would forgive the gap and approve a change of status. However, they would not give any specific comments with regard to larger gaps.

For those who are not able to maintain status until October 1, it will be necessary to leave the U.S. and wait outside the country for the H-1B petition to be approved, and then get an H-1B visa (unless visa exempt as a Canadian citizen) and reenter the U.S. on the H-1B. The earliest the beneficiary can be admitted is 10 days before the employment start date.

Returning to H-1B Status After Spending a Year Abroad

Immigration regulations state that if someone has spent six years in H-1B status, he is not permitted to enter the U.S. in H-1B status again unless he has spent at least a year outside the U.S. (The American Competitiveness in the Twenty First Century Act, or AC21, creates large exceptions to this rule for certain nonimmigrants. See our article on AC21 at http://www.usvisahelp.com/art_AC21.html). However, what was not clear until a December 2006 USCIS memo came out, was whether someone who had spent less than six years in H-1B status was eligible to return to the U.S. to finish up those six years after having spent a year outside the U.S. The memo clarifies that H-1B nonimmigrants in this situation who wish to return to the U.S. in H-1B status have the option of (1) obtaining a new H-1B and returning to the U.S. for the amount of time left of the initial six years (e.g. if the person has already spent 5 years in H-1B status, he would only be entitled to one year of H-1B status); or (2) obtaining a new H-1B and returning to the U.S. eligible for a full six years of H-1B status. The important distinction between these two options is that in the first case, when the H-1B holder returns to finish up his six years, he *is not* subject to the cap; in the latter situation, where he gets a full new six years, he *is* subject to the cap.

Someone contemplating these two options will have to carefully weigh the pros and cons of each scenario, and the conclusion will depend on the unique facts of each case. The first option, of finishing up the initial six years, would seem to be ideal for someone who has missed the cap (or does not want to risk missing the cap), and who would become eligible for post-6th year H-1B extensions under AC21. However, for certain individuals, this is an important way of getting around the H-1B cap.

Updated Filing Instructions

To add an interesting twist to the already harried experience of trying to get cases filed on time, the USCIS announced on March 5 that effective April 2, 2007, all forms I-129 and I-539 are to be filed directly to either the California or the Vermont Service Center, “as applicable.” However, they have yet to announce the criteria that will be used to determine which service center a case should go to. They promise to publish information on their website “prior to April 2, 2007” to clarify the new filing rules. It is possible that USCIS will return to its prior jurisdiction-based filing system rather than the current process which requires all cases to be filed at the Vermont Service Center so that USCIS can then forward all extension of stay requests to California. It is unclear when exactly, prior to April 2, USCIS plans to release this information.

Update on Proposed USCIS Fee Hike

In the last issue of *Immigration Newswire*, we reported that USCIS is proposing dramatic fee hikes. The American Immigration Lawyers Association reports that USCIS has set June 2007 as the target date for implementation of these fee hikes.

Toronto Consulate Visa Expedite Procedures

The U.S. Consulate in Toronto, Canada recently informed our office that it has procedures in place to expedite petition-based employment visa appointments in certain limited circumstances. These procedures apply to H-1B, H-1B1, H-2, L, O, P, and E-3 visas where the petitioner is either a for-profit firm with over \$25 million in sales and 1000 U.S. based staff or the employer is a government, educational, research or medical institution with a total of 1000 U.S. based staff/patients/students. In addition, the visa applicant must not have any prior U.S. visa ineligibility, no criminal arrest record, not be subject to administrative processing, not be subject to the 2-year foreign residency requirement, not be subject to the 6-year limit for H-1B status, not be visiting the U.S. on a B visa or under the visa waiver program, and not unlawfully present in the U.S.

If these conditions are met, the visa applicant can complete an expedite request form available on the consulate's web site and submit it to the consulate by email along with the requested appointment date. The consulate will then send an email approval or denial of the expedite request within 2 business days. If the request is approved, the applicant will be given a reference number to use in scheduling a visa appointment on the online visa appointment reservation system.

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