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# IMMIGRATION LAW UPDATE

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## Special points of interest:

- May 2007 Visa Bulletin Published—progress for EB-3: [www.state.gov](http://www.state.gov).
- H-1B cap reached in just 48 hours! US master's degree or higher H-1B category still open.
- Comprehensive Immigration Reform (CIR) legislation filed in the House.
- ICE workplace enforcement continues on a frantic pace.

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## H-1B Cap Reached in 48 Hours: Lottery System Implemented

The H-1B cap for FY 2008 (start date of October 1, 2007) was reached within 48 hours of the opening date for filing new applications on April 2, 2007. In fact, US Citizenship & Immigration Services (USCIS) was overwhelmed with applications and now estimates that they received 119,193 cap eligible H-1B petitions between April 2nd and April 3rd.

USCIS states that they have received 12,989 exemption cases based upon the fact that the applicant had a US master's degree of higher. Therefore, the FY 2008 cap for US earned master's or higher degrees remains open with approximately 7,000 visas available. While it is impossible to predict when the cap for master's exception might be reached, potential applicants should file as soon as possible. If the application is

not accepted due to the cap being reached, the filing fees will be returned and therefore the risk is minimized substantially for the applicant.

USCIS has stated that it will conduct a computer-generated random lottery from the 119,193 cap eligible FY 2008 applications that were received on April 2nd and April 3rd to determine who will receive the visas. USCIS reported that it will take a "substantial amount of time" to sort the mail prior to the lottery. A lottery for visa numbers is not unprecedented. Last year this problem resulted as well and a lottery was held for the final available visa numbers. The difference was that the visas lasted through mid-May. Those who do not receive H-1B visas will have the filing fees returned along with the application package and will



**The FY 2008 H-1B cap was reached in an unprecedented 48 hours this year as USCIS had received 119,193 cap subject applications by April 3rd.**

have to wait until April of 2008 for their next chance to obtain an H-1B visa.

## STRIVE Act Introduced in the House

Comprehensive Immigration Reform (CIR) took a step forward this month when Rep. Luis Gutierrez (D-Ill.) and Rep. Jeff Flake (R-Ariz.) introduced HR 1645—Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (STRIVE Act). The STRIVE Act contains various provisions which touch on border security,

enforcement, employer verification, a new foreign worker program, legalization program, visa reform, as well as other provisions. The new worker program would create a new visa, H-2C, that would be valid for three years and renewable for another three with an annual cap of 400,000 or as the job market dictates. After five years

an H-2C worker would be able to go onto "the path to citizenship." In addition, STRIVE would increase the H-1B cap to 115,000 while exempting certain highly-skilled immigrants and would also increase employment-based visas to 290,000 per year—an increase of over 130,000 per year.

## Back Wages Awarded to H-1B Employee

The outcome of *American Truss*, ARB Case No. 05-032 (Feb. 28, 2006) is not an unusual one. It is mentioned here to remind employers about the danger of failing to pay H-1B employees the wage as certified on the Labor Condition Application (LCA) certified by the Department of Labor (DOL). In fact, the regulations are so clear when it comes to H-1B wages, the employer in *American Truss* did not even dispute that it failed to pay five of its H-1B nonimmigrant employees the wages required under the H-1B

program and as certified in the LCA.

The Wage and Hour Division (WHD) of the DOL generally commences an audit when contacted regarding an employer's failure to pay the certified wage. The reason for failure to pay the wage is generally not important: the employer must pay this wage. It is decisions like this one that should remind employers to keep H-1B employees employed full-time and to pay the appropriate DOL certified wage. Plac-

ing employees on involuntary leave, benching them until more work materializes or wage cutting can lead to a WHD audit and a judgment for the employee. Employers that cannot keep the employee at full-time and full wage should lay the employee off and notify DOL and US Citizenship & Immigration Services (USCIS) that the relationship is terminated. While this may seem like a harsh proposition, paying a salary for a benched employee retroactively can be painful.



**An employer can protect itself from Wage & Hour Division Audits by keeping H-1B employees employed full-time at the DOL certified wage.**

## Consular Posts Resume Accepting I-130 Petitions

In the February 2007 M&M *Immigration Law Update* it was reported that consular posts had stopped accepting I-130 immigrant visa petitions due to new background check requirements implemented by the Adam Walsh Child Protection and Safety Act (Adam Walsh Act). The Adam Walsh Act requires that petitioners now receive background checks in addition to the usual background checks run on the beneficiary of the immigrant

visa petition.

The purpose of the Adam Walsh Act is to protect foreigners from would be sexual predators with criminal records in the United States. Consular posts had to stop accepting I-130 immigrant visa petitions when the Adam Walsh Act was implemented because they had no process in place for obtaining background checks on the US citizen and legal resident petitioners. This

problem has since been rectified in an agreement between US Citizenship & Immigration Services (USCIS) and the Department of State regarding the processing of background checks. Therefore, US citizens and legal residents can now file I-130 and where appropriate I-129 visa petitions directly with the US Embassy or Consulate abroad and have that petition adjudicated in the usual manner.

**“The purpose of the Adam Walsh Act is to protect foreign nationals from would be sexual predators with criminal records in the United States.”**

## May 2007 Visa Bulletin: EB-3 Moves Ahead 1 Year!

The May 2007 Visa Bulletin did something unexpected—it moved forward. The Department of State moved the EB visa numbers ahead in most categories. More good news was that EB-1 and EB-2 remained current. Meanwhile EB-3 moved forward to August 1, 2003. This is the first move forward for EB-3 in five months.

China, India, Mexico and the Philippines remained current in

EB-1 but varied in EB-2 and EB-3. China EB-2 again failed to move from April 22, 2005 while China EB-3 also failed to move from August 1, 2002. India EB-2 remained at January 8, 2003 and India EB-3 also failed to move from May 8, 2001. Mexico and the Philippines remained current in EB-2. Mexico is at May 15, 2001 for EB-3 while the Philippines moved forward to August 1, 2003 for EB-3.

On the Family-Sponsored side the entire world, as well as China and India had the same visa numbers: F-1 is May 15, 2001; F-2A is April 8, 2002; F-2B is October 1, 1997; and F-3 April 1, 1999. F-4 varied with 1995/1996 dates. Mexico and the Philippines lagged well behind the above dates. As always the visa bulletin can be located online: [www.state.gov](http://www.state.gov).

Department  
Of  
State



**The Visa Bulletin made surprising progress in the EB-3 category advancing one whole year from August 1, 2002 to August 1, 2003.**

## ICE Aggressive Enforcement Shows No Signs of Slowing

Immigration & Customs Enforcement (ICE) continued their trend of aggressive interior enforcement against employers and their workers. On March 6, 2007, ICE arrested more than 350 workers at Michael Bianco, Inc. (MBI) in New Bedford, MA. ICE alleges that the workers were working in the United States without authorization and with the full knowledge and encouragement of MBI owners and managers. It is alleged that MBI managers instructed and assisted illegal workers in obtaining fake green

cards and social security cards. The raid was likely embarrassing to the Department of Defense (DOD) which had granted MBI approximately \$92 million in DOD contracts since 2001.

Meanwhile, ICE obtained a \$12 million forfeiture order in an unlawful employment case against Garcia Labor Co., Inc. for conspiring to employ illegal aliens at a national air cargo firm in Ohio. The president of the company, Maximino Garcia was also sentenced to 15

months in prison and a \$25,000 fine in addition to the forfeiture of the \$12 million. The director of Human Relations was also sentenced to 8 months and the Vice President to two months in prison respectively.

On March 1, 2007, ICE officers in New Jersey arrested 220 aliens illegally present in the US as part of the ongoing enforcement operation entitled "Return to Sender." This operation is focused on apprehending immigration fugitives and removing them.



**ICE continues with an aggressive enforcement stance as hundreds are arrested across the United States.**

## H-1B Bill Introduced in the Senate

Senator Chuck Hagel (R-NE) introduced the High-Tech Worker Relief Act of 2007 (Act) on April 11, 2007. The Act is a stand alone bill and is intended to try and remedy the H-1B crisis currently unfolding (see page 1 of this newsletter). The Act would amend the Immigration & Naturalization Act to immediately increase the H-1B visa cap to 115,000 for 2007, 195,000 for 2008 and 65,000 for 2009.

The Act also would remove the numerical limitation on those applicants with US master's degrees or higher. Currently, US master's degrees or higher are exempted up to 20,000.

The Act would also exempt certain employment-based immigrant visa applicants from the annual numerical limitations. The Act authorizes an additional category of immigrants to be exempt from the

cap: "aliens who have earned an advanced degree in science, technology, engineering, or math and have been working in a related field in the united States under a nonimmigrant visa during the 3-year period preceding their application."

The Act would bring some immediate relief to employers and employees alike. However, the temporary nature of this Act in focusing on the current problem only is a concern.

**"The Act would exempt certain employment-based immigrant visa applicants from the annual numerical limitations."**

## H-2B Cap Reached for Second Half of FY 2007

On March 23, 2007, US Citizenship & Immigration Services (USCIS) announced that they had received enough H-2B applications to meet the second half of FY 2007 cap. The cap limit is 33,000 for new H-2B employees for each half of a fiscal year. This is bad news for those seasonal employers who have missed out.

The H-2B visa allows seasonal employers to expand their employee base on a temporary

basis to meet the demand of the busy season. The service industry is ordinarily under severe pressure because of this cap because there are insufficient visas available to meet the many positions available in hotels, restaurants, landscaping, construction, labor and other seasonal employment areas.

However, the situation is not as bad as it has been in the past thanks in part to the Save of Small and Seasonal Businesses

Act of 2005 (SOSSBA), which split the available visa numbers over the first and second half of each fiscal year and also exempted returning workers from the H-2B cap. A returning worker is exempt as long as he/she was counted against the cap during one of the past three fiscal years. Splitting the visa numbers made the distribution more equitable for employers in all parts of the US who have different seasonal needs.



**Seasonal labor will again have to adapt as the H-2B visas closed out for the second half of FY 2007.**

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Links of Interest:

[www.state.gov](http://www.state.gov)  
[www.uscis.gov](http://www.uscis.gov)  
[www.foreignlaborcert.doleta.gov/](http://www.foreignlaborcert.doleta.gov/)

<http://pds.pbls.doleta.gov>

[www.maiona.lawoffice.com](http://www.maiona.lawoffice.com)

  
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Attorney Maiona has been the keynote speaker at seminars for the Employment Management Association of New England and Sterling Education Services, as well as private recruiting firms on the topic of business immigration law. Attorney Maiona is a contributing author to the Massachusetts Continuing Legal Education's two volume treatise: *Immigration Practice Manual*. Attorney Maiona received his B.A. cum laude from Boston College and his J.D. from Suffolk University Law School. Attorney Maiona is a member of the New England chapter of the American Immigration Lawyers Association. Attorney Maiona can be reached at 617-695-2220 x103 or by email at [mjm2@gis.net](mailto:mjm2@gis.net).

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## The Word From Washington, D.C.

On March 15th, several immigration lawyers from the American Immigration Lawyers Association (AILA) went to Washington, DC to speak with representatives and senators about Comprehensive Immigration Reform (CIR). Our New England delegation met with Congressmen and women from ME, NH, MA, RI and VT. We discussed the daily problems of our clients in regard to the antiquated immigration system. Overall we were well received and I was especially encouraged by the eagerness of the congressmen and women to learn more about the immigration crisis. We had the opportunity to raise many of the issues close to our client base; including H-1B cap relief, employment-based green card relief, and family unification.



**The news from Washington , DC is encouraging...provided there is a vote on CIR by August of 2007.**

It is widely believed in Washington that a CIR bill must be voted on before the August

summer recess in order for it to happen at all prior to the presidential election in November of 2008. Now we will keep our eyes on Congress.

You can play a part in making CIR a reality. Contact your representative or senator's office and tell them that you support CIR. Employer's should call or email their concerns and issues that have been caused by the unavailability of H-1B visas and employment-based visas, as well as the "brain drain" caused by the current shortages. You can contact Congress simply by dialing the US Capitol Switchboard at (202) 224-3121. The Operator will do the rest by transferring you to the appropriate congressional office and staff.