

Reduction in Number of H-1Bs Expected in 2004

This latest issue of the *Immigration Advisory* features a number of important developments in the immigration field. Most notably, employers who expect to petition for H-1B visas should be aware of an impending reduction in the number of H-1Bs available next year.

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H-1B Limitations

In Fiscal Year 2003, the U.S. Citizenship and Immigration Services (f/k/a INS) was authorized to issue 195,000 new H-1B visas. However, that quota expired as of September 30, 2003. Congress has not yet increased the number of available H-1Bs for Fiscal Year 2004 and may not do so. Without such a change, there will only be 65,000 new H-1Bs available during the 2004 fiscal year (beginning October 1, 2003). The \$1,000 surcharge imposed for H-1B petitions a few years ago also expired on September 30, reducing the base filing fee to \$130.

Employers should consider any reduction in available new H-1Bs in their hiring plans. While the statute states that the H-1B quota will be based on the date that an H-1B petition is "filed," the statute did not contemplate the fact that USCIS would initiate a "premium processing" service, which allows H-1B petitions to be processed in 15 days. Thus, petitioners who use premium processing are likely to go to the front of the line. Therefore, it is perhaps more critical than ever that premium processing be used for new H-1Bs.

Note that the H-1B cap applies to new H-1Bs, regardless of whether they are outside the U.S. or are in some other status (for instance, F-1 or J-1). For instance, if you have an employee who is in F-1 status and is doing his/her practical training, and the person's one year of work authorization will expire some time later this year, it would be wise to proceed with changing their status to H-1B now as opposed to

waiting until their status is about to expire since there may be no more H-1Bs available at that time. The cap does not apply to extensions of existing H-1Bs, and it does not apply to individuals who are already in H-1B status and whose initial visa counted against the cap in a prior fiscal year. In addition, the H-1B cap does not apply to institutes of higher education, nonprofit institutions or government research institutions.

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L-1 Legislation Status

Legislation proposed in the House of Representatives to restrict the use of the L-1 visa category that we reported on in July 2003, has been referred to committee. It has picked up two additional sponsors in September, which gives it 13 sponsors. Furthermore, Senator Saxby Chambliss (R-Ga.) proposed legislation on September 17 to reform the L-1 visa program. Although it is too early to predict whether Congress will pass legislation amending the L-1 program, employers should be aware that this is a distinct possibility since there appears to be bipartisan support for changes.

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PERM

It is taking the DOL longer than initially projected to implement the PERM regulations. The current timeline, although still speculative, will result in PERM being issued later this year, with an effective date some time in the first quarter of 2004. PERM will also create two Backlog Reduction Centers and two PERM Centers. It appears that Regional Offices, which currently adjudicate labor certification applications, will oversee supervised recruitment when the PERM center has a problem with a case.

As we have advised previously, PERM could have a dramatic - and negative - effect on the ability to pursue labor certifications. For this reason, many employers have accelerated their efforts to obtain permanent residency for employees, since PERM should not apply to labor certification applications filed before the rules go into effect. For more information about the PERM issue, please call us.

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Consular Changes

If you will be traveling overseas and need to apply for a visa while abroad, please be sure to contact the U.S. consulate in the country you will be visiting to learn about their procedures and timing. Even if you are told that it will take a certain amount of time to process the visa, this is not a guarantee -- the procedures and timing are constantly changing.

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DV-2005 Immigrant Visa Lottery

▶ Electronic Registration for Fiscal Year 2005 (November 1, 2003 – December 30, 2003)

The U.S. Department of State has published the final regulations regarding the Diversity Immigrant Visa (green card) Lottery (DV 2005) program. The Immigration Act of 1990 established, beginning with the U.S. government's Fiscal Year 1995, the visa lottery program. The DV-2005 program will provide 50,000 permanent visa numbers during each federal fiscal year to benefit "natives" of certain "low admission" countries. Applications for registration must be made **separately** each year during the application period and must **precisely** follow the regulations established by the United States Department of State for that fiscal year.

▶ Eligibility

- In order to participate in the DV 2005 lottery program, the alien (1) must be a "native" of any country in the world except the following: **Canada, China (mainland-born are excluded, but natives of Hong Kong SAR, Macau SAR, and Taiwan are allowed to participate), Colombia, the Dominican Republic, El Salvador, Haiti, India, Jamaica, Mexico, Pakistan, the Philippines, Russia, South Korea, the United Kingdom and its dependent territories (natives of Northern Ireland are eligible to participate) and Vietnam**; and (2) must have a high school education or its equivalent, or have at least two years experience, within the past five years, in an occupation that requires two years of training or experience to perform.
- "Native" is generally defined to reflect country of birth, not nationality, but there are four exceptions to the general "place of birth" rule: (1) if an alien's spouse was born in an included country, the alien may qualify as a native of that country as well, providing both the applicant and spouse are issued visas and enter the U.S. simultaneously; (2) a "child" (defined as those unmarried and under age 21) may qualify as a native of the country of which either parent is a native; (3) where an alien was born in a foreign state in which neither parent were born or had a residence at the time of the alien's birth, the alien may qualify, in certain cases, as a native of either parent's country, even if he no longer qualifies as a child; and (4) an alien born in the U.S. but who does not possess U.S. citizenship may qualify as a native of his current country of citizenship, or, if stateless, current country of residence. **Note: An applicant claiming entitlement based on an exception to the general "place of birth" rule must include a statement to this effect on the application form.**

▶ Application

- Only one application per person may be submitted. Submission of more than one application will disqualify the person from registration.
- **Failure to provide all of the information listed will disqualify the applicant.**
- The State Department will only accept completed Electronic Visa Entry Forms submitted electronically at <http://www.dvlottery.state.gov/> for sixty days beginning November 1 (for more information, visit <http://travel.state.gov/dv2005.html>). The Department of State will send DV lottery entrants an electronic confirmation notice upon receipt of a completed

Entry Form. An application for registration must include the following information:

1. The applicant's full name in Roman alphabet;
Last Name (surname/family name), First Name, Middle Name.
2. The applicant's date and place of birth; Date Of Birth: day, month, year
Place Of Birth: City/Town, District/County/Province, Country
The name of the Country should be that which is currently in use for the place where the applicant was born (i.e., Slovenia rather than Yugoslavia).
3. Gender - Male or Female.
4. The applicant's mailing address and if applicable, his or her telephone number.
5. The applicant's e-mail address, if applicable.
6. Marriage status.
7. The applicant's native country, if different from the country of birth.
8. Digital photograph - see following instructions.
9. Number of children that are unmarried and under 21 years of age.
10. Spousal information - Name, Date of Birth, Gender, City/Town of birth, Country of birth and photograph. **Failure to include the required biographic details of a spouse is cause for disqualification.**
11. Children information - Name, Date of Birth, Gender, City/Town of birth, Country of birth and photograph. **Failure to include the required biographic details of children is cause for disqualification.**

Note: Entries must include information about all natural children, as well as legally-adopted, and step-children who are unmarried and under age 21, except those who are U.S. citizens or Legal Permanent Residents.

- There is no application fee.
- **Applications will be accepted beginning on Saturday, November 1, 2003 and ending on Tuesday, December 30, 2003. Applications must be electronically filed.**
- Spouses may submit separate applications, but the application includes the applicant's spouse so long as the marriage takes place prior to the applicant's admission to the United States for permanent residence, and includes children, so long as the child is an issue of a marriage which takes place prior to the applicant's admission to the U.S. for permanent residence. Again, the definition of "child" is restricted to those unmarried and under age 21.
- Documentary proof of the required education or work experience is not required at the time of registration for the DV 2005 program, but will be required for successful registrants at a later date.

▶ **Photograph Instructions**

If the submitted digital images do not conform to the following specifications, the system will automatically reject the Entry Form and notify the sender.

- The image must be in the Joint Photographic Experts Group (JPEG) format.
- The image must be either in color or grayscale; monochrome images (2-bit color depth) will not be accepted.
- If a new digital photograph is taken, it must have a resolution of 320 pixels wide by 240 pixels high, and a color depth of either 24-bit color, 8-bit color, or

8-bit grayscale.

- If a photographic print is scanned, the print must be 2 inches by 2 inches (50mm x 50mm) square. It must be scanned at a resolution of 150 dots per inch (dpi) and with a color depth of either 24-bit color, 8-bit color, or 8-bit grayscale.
- The maximum image size accepted will be sixty-two thousand five hundred (62,500) bytes.

If the submitted digital images do not conform to the following specifications, the entry will be disqualified:

- Applicant, spouse, or child must be directly facing the camera; the head of the person being photographed should not be tilted up, down or to the side, and should cover about 50% of the area of the photo.
- The photo should be taken with the person being photographed in front of a neutral, light-colored background. Photos taken with very dark or patterned, busy backgrounds will not be accepted.
- Photos in which the face of the person being photographed is not in focus will not be accepted.
- Photos in which the person being photographed is wearing sunglasses or other paraphernalia which detracts from the face will not be accepted.
- Photos of applicants wearing head coverings or hats are only acceptable due to religious beliefs, and even then, may not obscure any portion of the face of the applicant. Photos of applicants with tribal or other headgear not specifically religious in nature are not acceptable. Photos of military, airline or other personnel wearing hats will not be accepted.

▶ **Processing**

- Only applications received at the Kentucky Consular Center during the application period will be eligible for **random** selection by computer.
- Sometime between May and July, 2004 the Kentucky Consular Center will notify successful applicants (lottery winners), at the address listed on their entry, and provide them with further visa application instructions.
- Successful applicants will have between October 1, 2004 and September 30, 2005 to obtain their immigrant visa (green card). If the immigrant visa is not obtained prior to September 30, 2005, it will be abandoned. Diversity visas cannot be issued or adjustments approved after September 30, 2005, nor can family members obtain diversity visas to follow to join the applicant in the U.S. after this date.

For more details about the DV 2005 program, please see:
<http://travel.state.gov/dv2005.html>.

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