

December 8, 2004

Section by Section Summary of L-1 & H-1B Amendments Included in Fiscal 2005 Omnibus Appropriations (H.R. 4818)

Subtitle A-- L-1 Visa Reform

Section 411: Short Title--"L-1 Visa (Intracompany Transferee) Reform Act of 2004"

Section 412: Non immigrant L-1 Visa Category

This section modifies the INA § 214(c)(2) to prevent an L-1 visa holder from being primarily stationed at the worksite of another employer in cases where:

- (1) The L-1 visa holder will be controlled and supervised by an unaffiliated employer, or
- (2) The placement of the L-1 visa holder at the third party site is part of an arrangement to provide labor for the third party rather than placement at the third party site in connection with the provision of a product or service involving specialized knowledge specific to the petitioning employer.

The above modification to the law applies to initial, extended or amended petitions filed on or after the effective date.

Section 413: Requirement for prior continuous employment for certain intracompany transferees

This section strikes from INA § 214(c)(2)(A) the provision permitting the six-month work requirement for L-1 blanket petitions. The modification made by this section applies only to petitions for initial classification filed on or after the effective date of the subtitle.

Section 414: Maintenance of Statistics by the Department of Homeland Security

This section mandates that DHS maintains statistics for L-1 petitions filed on or after the effective date. Statistics will be gathered on the following:

- Number of nonimmigrants who are classified in the L-1B category; and
- Number of L-1B nonimmigrants who will work primarily offsite.

Section 415: Inspector General Report on L Visa Program

No later than 6 months after the date of enactment, the Inspector General (IG) of DHS shall examine and report to the House and Senate Judiciary committees on the vulnerabilities and the potential abuses in the L visa program.

Section 416: Establishment of Task Force

This section mandates the development of an L Visa Interagency Task Force no later than 6 months after the date of enactment of this act. Included in the task force are representatives from DHS, DOS, and DOJ.

This task force shall report to the House and Senate Judiciary Committees on the efforts to implement the IG's recommendations set forth by the report mandated in section 415 above. The task force will also include recommendations to Congress, including suggestions for legislation.

Section 417: Effective Date

The subtitle and the Amendments made by the subtitle take effect 180 days after the date of enactment of the Act.

Subtitle B-- H-1B Visa Reform

Section 421: Short Title--"The H-1B Visa Reform Act of 2004"

Section 422: Temporary Worker Provision

a) Removes the sunset provision from INA § 212(n)(1)(E)(ii) and makes permanent the provision requiring a non-displacement attestation on the LCA by employers who are H-1B dependant or have committed a willful failure or misrepresentation during the preceding 5 years.

b) Modifies INA § 214(c)(9) by removing the sunset provision on the employer fees and making the fees permanent. This section also raises the fee for each petition from \$1,000 to \$1,500. Employers with no more than 25 full-time employees employed in the U.S. will only be responsible for ½ of the fee amount.

Section 423: Prevailing Wage Level

Modifies INA §212(p) to require employers to pay 100% of the prevailing wage. However, this section also mandates that where the DOL uses or makes available to employers a governmental survey to determine prevailing wage, such survey shall provide 4 levels of wages commensurate with experience, education, and the level of supervision. If a 2 level wage survey is used, this section provides a formula for calculating the 2 additional intermediate levels.

Section 424: DOL Investigative Authorities

a) Creates a new subsection (G) under INA §212(n)(2) to take effect as if enacted on October 1, 2003. The new subsection would:

i) Reinstates and makes permanent the ability of DOL to initiate an investigation of an employer if there is reasonable cause that the employer is not in compliance with this subsection. The Secretary of Labor (or acting Secretary) must personally certify that reasonable cause exists and must approve the investigation. The investigation may be initiated for reasons other than completeness and obvious inaccuracies by the employer.

ii) Permits the DOL to conduct an investigation if it receives credible information from a known source likely to have knowledge of an employer's practices or conditions. The information must provide reasonable cause that the employer has committed a willful failure to meet a condition, or has committed a substantial failure to meet a condition that affects multiple employers.

iii) Directs the DOL to create procedures for providing information that may be used as the basis of an investigation.

iv) An investigation under subsection (ii) must be from information that originates from a source other than DOL or was lawfully obtained by DOL during another DOL investigation.

v) Information provided to the DOL by the employer for purposes of securing an H-1B employee shall not be considered a receipt of information under this subsection.

vi) No investigation or related hearing may be conducted unless the information is received within 12 months after the date of the alleged failure.

vii) Directs DOL to provide notice to an employer prior to the commencement of an investigation with limited exception.

viii) An investigation by DOL may last for 60 days, and if there is evidence of a violation, DOL shall provide the employer with notice of the determination and an opportunity for a hearing. The hearing must take place within 120 days of the determination and a finding must be made within 120 days of the hearing.

b) Good Faith Compliance-This section would modify INA §212(n)(2) so that an employer is deemed to have complied with the section, notwithstanding a technical or procedural failure to meet such requirements, if there was a good faith to comply with the requirements. This good faith clause shall not apply if DOL has explained the basis of the failure or if the employer has been given time to correct the failure and has failed to do so.

Under this subsection, an employer will not be assessed fines or penalties for failure to pay the prevailing wage if he can establish that the manner in which the prevailing wage

was calculated was consistent with recognized industry standards and practices.

c) Secretary of Labor Report- by January 31 of each year, DOL shall report to the Senate and House Judiciary Committees on the investigations undertaken based on INA §212(n)(2)(G)(i) and (ii) as well as the expenditures by DOL in INA § 286(v)(2)(D).

Section 425: Exemption of certain aliens from numerical limitations on H-1B nonimmigrants

a) Modifies INA §214(g)(5) to include among the classes of H-1B exempted aliens an alien who has earned a Master's or higher degree from a U.S. institution of higher education. This exemption is capped at 20,000 per fiscal year.

b) This section also requires DHS, for each fiscal year, to maintain the following statistical information on each alien who is issued a visa or otherwise provided nonimmigrant status and is exempt under INA § 214(g)(5): country of origin; occupation; education level maintained; compensation. The statistical information will be included in the annual report on H-1Bs.

Section 426: Fraud Prevention and Detection Fee

a) Adds to INA §214(c) a new \$500 fraud fee. Such fee will be in addition to other fees and will apply to employers filing either an initial petition for an H-1B or L visa or for a change of status or change of employer petition. A \$500 fraud fee will also be charged for an alien filing a visa application abroad for an L blanket petition. The fee will be imposed only on principal aliens.

b)The money collected will be deposited in the "H-1B and L Fraud Prevention and Detection Account" and divided equally among DOS, DHS and DOL.

c) Effective Date- the amendments in this section take effect on the date of enactment and the fees imposed apply to petitions and visa applications filed 90 days after the date of enactment.

Section 427: Change of Fee Formula

This section modifies the distribution of money in the H-1B nonimmigrant petitioner account as follows:

Job training- from 55% to 50%
Scholarship program- from 22% to 30%
National Science Foundation grant program for K-12 Math. Science and Technology education- from 15% to 10%
DHS processing from 4% to 5%
DOL processing maintained at 5%

Section 428: Grants for Job Training for Employment in High Growth Industries

Modifies section 414 (c) of the American Competitiveness and Workforce Improvement Act (ACWIA) and re-authorizes DOL to award grants to provide job training for industries

and economic sectors that are projected to experience significant growth.

Section 429: National Science Foundation Low-Income Scholarship Program

Modifies section 414(d) of ACWIA to allow the NSF to award scholarships for computer science or other technology or science programs. This section also increases the scholarship amount from \$3,125 to \$10,000. It also allows the NSF to use up to 50% of their funds for curriculum development, professional and workforce development, and other advance technological education.

Section 430: Effective Dates

Except as otherwise provided, the H-1B subtitle shall take effect 90 days after the date of enactment. However, sections 422(b), 426(a) and 427 take effect immediately.