FOSTERQUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©

July 5, 2011

This Immigration Update© from FosterQuan, LLP contains important information regarding the following:

B-1 BUSINESS VISITOR VISA DRAWS HEAVY SCRUTINY

Following a lawsuit, a grand jury subpoena, and a letter from Senator Charles Grassley to Secretary of State Hillary Clinton and Secretary of the Department of Homeland Security Janet Napolitano, policymakers and the media are focused on the alleged widespread use of B-1 business visitor visas to circumvent the regulatory requirements of the H-1B visa program.

Critics such as Senator Grassley allege that employers such as Infosys Technologies Limited are rotating employees to the United States for work assignments using B-1 business visitor visas rather than an appropriate work-authorized visa such as an H-1B or L-1 visa. Because of the scrutiny brought to bear on the B-1 visitor category, employers are urged to carefully review the purpose of each employee's visit to the United States to ensure that the employee's visa is appropriate for the activities the employee will perform in the United States.

The B-1 Business Visitor Visa is appropriate for individuals coming to the U.S. to engage in business activities other than the performance of skilled or unskilled labor. Specific examples from the Department of State of appropriate B-1 activities include participating in business meetings and consulting with business associates. B-1 visitors are generally not permitted to engage in gainful employment or to fill positions which would ordinarily be filled by a U.S. worker in the course of the company's U.S. business operations.

In some cases, under limited circumstances, employees may be transferred for short periods of time under a specially annotated "B-1 in lieu of H-1B visa" which specifically permits hands-on work activity in the United States so long as the individual will not receive payment from U.S. sources and is otherwise qualified for the H-1B classification. Such annotated visas are relatively rare, and absent an appropriately annotated visa, B-1 visitors are generally required to confine their activities in the United States to business meetings, consultations, conference attendance, contract negotiations, and similar activities, and should not be paid from U.S. sources. Senator Grassley has taken issue with this particular use of the B-1 visa program and has called for "a thorough review" of the Foreign Affairs Manual provisions that allow for it.

In a response letter to Senator Grassley, Joseph E. Macmanus, Acting Assistant Secretary, Legislative Affairs for the Department of State provided assurances that the Department of State is "in the process of discussing with DHS removing or substantially modifying the B-1 in lieu of H guidelines." He further noted that the B visa refusal rate at one U.S. consular post in India has increased by 25%, and that the U.S. mission's Business Executive

Program has suspended five large employer participants after discovering fraudulent visa activity by employees.

The Department of State's rapid response and commitment to further review of current procedures and guidelines does not come as a surprise. In fact, Senator Grassley's previous letters to the Department of Homeland Security have prompted swift and significant changes in DHS adjudications. The Senator's letter concerning the perceived insufficient level of scrutiny during the H-1B adjudications process led to stricter CIS adjudication standards, particularly focused on the employer-employee relationship and the "benching" of H-1B workers between projects. Consulting companies have felt the most significant impact, although employers in other market segments also have reported higher rates of CIS Requests for Evidence and H-1B petition denials. Once an H-1B petition is approved, the CIS also conducts random H-1B "site visits" to check in with H-1B employers and employees, thus adding an additional level of post-approval fraud detection capability.

Employers who frequently bring high volumes of business visitors to the United States should be aware of the additional scrutiny by the Department of State during the visa application process as well as the additional scrutiny by U.S. Customs & Border Protection inspecting business travelers at the U.S. port of entry. Employees visiting the United States should confine their activities to those activities disclosed in the visa interview at the U.S. consulate and should be prepared to explain those activities to CBP officers upon arrival in the United States.

In addition to thoroughly reviewing an employee's activities when visiting the United States, employers should also be aware of the travel patterns their employees establish. Frequent trips and/or trips lasting more than a few weeks could signal that an employment-authorized visa may be required in lieu of a business visitor visa. Employers are encouraged to consult their FosterQuan attorney regarding visitor admissions, particularly for lengthier periods of stay, to ensure that the activities are appropriate for business visitors.

To initiate a nonimmigrant visa petition for an employee requiring a work-authorized status in the United States, or to discuss the limitations of the business visitor category, contact your FosterQuan immigration attorney. As always, FosterQuan will continue to monitor U.S. consular procedures that may impact business travelers and will provide further information via future Immigration Updates© and on our website at www.fosterquan.com.