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Immigration Update – December 9, 2004

Trow & Rahal, P.C. is pleased to provide this Immigration Update as a service to our clients and friends.

President Bush has signed the Omnibus Appropriations Act for FY 2005, which makes important changes to the H-1B and L-1 visa categories.

20,000 Additional H-1B Visas Made Available– Up to 20,000 foreign nationals who have earned a master’s degree or higher from a U.S. university will be exempt from the H-1B visa cap each year. This exemption is vitally important for foreign nationals who graduated from U.S. universities during 2004 and are now working in F-1 or J-1 visa status with practical training authorization. The exemption takes effect on March 8, 2005, and petitions for qualifying beneficiaries cannot be filed until that date. We expect that these 20,000 new slots will be taken quickly, so we recommend that employers plan ahead to file their petitions on March 8. The regular allotment of 65,000 H-1B slots for fiscal year 2005 was exhausted on October 1, 2004 (the first day of the fiscal year) by petitions filed during the preceding six months. There are no changes in the other exemptions from the H-1B cap, as described in our Immigration Update on October 4, 2004.

Higher H-1B Filing Fees – Effective immediately, U.S. Citizenship and Immigration Services (“CIS”) will require a new “training” fee of \$1,500 for most H-1B visa petitions. The fee is reduced to \$750 for employers that have no more than 25 full-time equivalent employees, including employees of affiliates and subsidiaries. This fee will fund job training and scholarships for U.S. workers, and government processing of H-1B cases.

Effective March 8, 2005, CIS will require an additional \$500 “fraud prevention” fee for each petition seeking an initial grant of H-1B visa status or authorization to change employers in H-1B status. This fee will not apply to petitions to amend or extend H-1B status with the same employer. It will provide additional funding for visa fraud prevention programs at CIS and other government agencies.

These new fees are separate from the mandatory \$185 base fee for an H-1B visa petition, and the optional \$1,000 fee for premium processing (faster service) from CIS.

Changes in H-1B “Prevailing Wage” Requirements – For H-1B petitions filed on or after March 8, 2005, employers must pay their H-1B workers at least 100% of the “prevailing wage” rather than 95% of that wage as now permitted. The prevailing wage is the average wage paid by other employers to workers with similar qualifications who perform similar duties in the same

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geographic area. This wage is determined by various means including a wage survey published by the Department of Labor (“DOL”) and private surveys published by consulting firms, trade associations and other sources. The DOL survey has been widely criticized for providing data for only two levels of relevant work experience, leading to inflated wage determinations for employees who are beyond entry level. The new law requires DOL to provide data for at least four levels of work experience, and in the interim provides a formula to convert the two-level DOL data to four levels.

Restrictions on Use of L-1 Visas for Outsourcing – The new law prohibits the issuance of L-1 visas to non-managerial employees who will be stationed primarily at the worksite of a company other than their petitioning employer (or its parent, subsidiary or affiliate) if: (1) the employee will be controlled and supervised principally by that unaffiliated company; or (2) the placement at the worksite of the unaffiliated company is essentially an arrangement to provide labor for hire for the unaffiliated company, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. This restriction applies to L-1B petitions and extensions filed on or after June 6, 2005, and does not affect L-1A petitions (for managerial or executive employees) or previously approved L-1B petitions.

Tighter Standards for Blanket L-1 Petitions – The new law increases from six months to one year the period of employment abroad that is required to qualify for an L-1 visa pursuant to a “blanket” L-1 petition. This eliminates one advantage that blanket petitions have over individual petitions, which have always required one year of employment abroad. The change takes effect on June 6, 2005, and applies only to new L-1 petitions, so it will not preclude extension of stay for employees who have previously used a blanket petition to obtain L-1 status.

Blanket L-1 petitions will continue to offer faster processing times for employees (other than Canadian citizens) who work for an employer that has filed 10 or more L-1 petitions in the past 12 months, or has consolidated U.S. sales of at least \$25 million, or has a U.S. workforce of at least 1,000 employees.

Higher L-1 Filing Fees – Effective March 8, 2005, CIS will require an additional \$500 “fraud prevention” fee for each petition seeking an initial grant of L-1 visa status or authorization to change employers in L-1 status. Like the H-1B fraud prevention fee, it will not apply to petitions to amend or extend L-1 status with the same employer.

If you have questions about these changes, or a particular case that may be affected by them, please contact one of the Trow & Rahal attorneys listed below.

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