PROSKAUER ROSE LLP

Immigration and Nationality Law Update

A report for clients and friends

JANUARY/FEBRUARY 2009

In this month's issue:

Edited by

David Grunblatt

Proskauer Obtains Stay of Implementation of E-Verify Regulation

Federal contractors and subcontractors can temporarily breathe a sigh of relief and delay implementing use of the Department of Homeland Security's ("DHS") E-Verify System. The E-Verify System is designed to electronically check whether new hires are eligible to work in the U.S. Pursuant to an Executive Order that would have become effective on January 15, 2009, a new rule would have required many Federal contractors to begin using E-Verify for all new hires and to reverify any existing employees working on federal contracts. As a result of a lawsuit filed by Proskauer on behalf of the U.S. Chamber of Commerce, the effective date of the rule has now been delayed to May 21, 2009. Unless a further delay is announced on or after that date, certain existing government contracts and new contracts will be modified to include a clause requiring E-Verify if the remaining period of performance extends beyond November 21, 2009.

H-1B Filing Season in Full Swing

As we have previously advised, the new H-1B filing season is in full swing. It is important that employers identify potential H-1B petitions ripe for filing as soon as possible. Of the potential beneficiaries for H-1B petitions, most critical are current employees or new hires with an immigration status that will not allow them to work continuously through October 1, 2010, or those for whom a change of status is necessary in planning for a possible green card. These may include:

- **F-1** students
- **J-1** exchange visitors
- **H-3** trainees
- **L-1B** specialized knowledge employees
- **TN** NAFTA professionals
- **L-1A** managers (who do not qualify for permanent residence as multinational managers)

By way of background, current immigration law contains a "cap" of 65,000 new H-1B approvals each fiscal year, of which 6,800 are set aside for the H-1B1 visa program under the U.S.-Chile and U.S.-Singapore Free Trade Agreements. In addition to the standard H-1B cap availability of 58,200, the H-1B Visa Reform Act of 2004 makes available 20,000 additional H-1B slots for foreign workers with a master's or higher degree from a U.S. academic institution. FY 2010 begins on October 1, 2009; the USCIS will begin accepting H-1B petitions for FY 2010 on April 1, 2009.

New Form I-9 Becomes Effective April 3, 2009

The new I-9 form, whose implementation was delayed for 60 days, takes effect on April 3, 2009. It was originally scheduled to take effect on February 2. Among the changes, the new form further revises the list of acceptable List A documents to bring the list into greater conformity with the current document-issuing practices of the DHS. It also prohibits the presentation of any expired documents and specifically allows for presentation of certain documentation by citizens of the Federated States of Micronesia and the Republic of the Marshall Islands.

TARP Recipients Limited in Hiring H-1B Workers

The American Recovery and Reinvestment Act of 2009 ("the Obama Stimulus Bill") includes Section 1611, the Employ American Workers Act, which limits banks and financial institutions from hiring H-1B workers if U.S. workers have been laid off and requires that they offer positions to qualified U.S. workers first.

The Act became effective on February 17, 2009 and will sunset in two years. The bill places new restrictions on H-1B petitions filed by a company that receives funding under Title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343, the "TARP Bill") or under Section 13 of the Federal Reserve Act (12 U.S.C. § 342 et seq.). Under the Act, it is unlawful for any recipient of the funding to hire an H-1B nonimmigrant worker unless the recipient has complied with the additional Labor Condition Application attestations imposed on H-1B dependent employers. Specifically, the employer must attest that:

- Prior to filing the H-1B petition, it has taken good-faith steps to recruit U.S. workers for the position for which the H-1B worker is sought, offering a wage that is at least as high as that required under law to be offered to the H-1B worker. Further, in connection with this recruitment, it has offered the job to any U.S. worker who applies and is equally or better qualified.
- It has not laid off, and will not lay off, any U.S. worker in a job that is essentially equivalent to the H-1B position in the area of intended employment of the H-1B worker within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing.

The exemption for H-1B workers who possess master's degrees or who receive wages of at least $60,000, normally permitted within the H-1B Dependent Rules, is not available for TARP recipients. It does not appear that the restrictions will affect H-1B employees already working for TARP recipients; however, no guidance or regulations have been issued by USCIS or the DOL, so their interpretation remains unknown.

Important Updates from Department of Labor

On February 3, 2009, the Department of Labor (DOL) held its Quarterly Stakeholders Meeting with representatives from various associations including the American Immigration Lawyers Association (AILA) and the American Bar Association (ABA). The DOL provided important updates regarding the PERM processing times, the new online portal for Labor Condition Application (LCA) and PERM filings, and supervised recruitment.

1. PERM Processing Times

The DOL continues to have backlogs in processing times for filed PERM applications. At the February meeting, the DOL explained that processing had slowed down in the last quarter of 2008 because of the hiring and training of new contract employees at the Atlanta National Processing Center. The DOL advises that the pace of processing is expected to pick up with these new hires. In addition, the DOL provided an update on estimated processing times. The DOL is processing: a) cases with priority dates in June 2008; b) audited cases with priority dates in August 2007; c) cases in the appeal queue from April 2007; and d) cases in the government error appeal queue on a "current" basis.

2. New Online Portal for LCA and PERM Applications to be Rolled Out Shortly

As we previously reported, the DOL has developed a new online portal, iCERT, to replace the current online systems used for Labor Condition Applications (LCA) and PERM applications. The new iCERT portal will offer both employers and their representatives a single online location to be able to register and log on for LCA and PERM filings. With the new system, the LCA and PERM forms also will change over the course of the next several months. While the forms and process will be changing, it is important to note that the legal requirements for LCA and PERM applications will not change.

Beginning **April 15, 2009** the DOL will implement a new form ETA 9035, Labor Condition Application (LCA) through iCERT. By **May 15, 2009,** all new LCAs must be filed using iCERT. The LCA is required to be filed and certified for nonimmigrants in professional/specialty occupation, and fashion model categories (i.e. H-1B, H-1B1, and E-3). In the last several years, the DOL regularly issued instant certifications once an LCA was submitted through the online system. With the new LCA, the DOL advises that employers should not expect instantaneous certifications. This significant change may impact and slow down the H-1B filing processes, particularly where an H-1B employee is changing employers. We will keep you apprised of developments and how to best strategize in this area.

Beginning **July 1, 2009** the DOL will begin accepting new PERM applications through the new iCERT portal. By **August 1, 2009**, all new PERMs must be filed using iCERT. The new PERM application has a number of revisions. We will update our clients on the relevant changes in the upcoming months.

3. Supervised Recruitment and Layoffs

During the February Stakeholder meeting, the DOL acknowledged that the rising unemployment rates around the country are a significant concern for PERM applications. In response to reports of widespread layoffs, the DOL advises that it will increase supervised recruitment practices (see section below discussing supervised recruitment). The DOL highlighted the example of a PERM application filed for a job opportunity for the occupation of Financial Analyst in New York City. Since this is an example of a particular occupation and location where there may be qualified U.S. workers due to industry wide reductions in workforce, supervised recruitment may be more likely. The DOL did not provide other examples of "targeted" occupations, but did explain that it is analyzing data closely regarding layoffs.

Supervised Recruitment

The DOL has announced that it is paying attention to unemployment rates, layoffs, and the availability of U.S. workers when processing PERM applications. As a result, the DOL is expected to require more employers to conduct recruitment under the direct supervision of the DOL.

What Is Supervised Recruitment?

Supervised recruitment is not a new concept for the DOL. In fact, it is virtually the same procedure that was used to file applications for labor certification prior to the initiation of the PERM program in 2005. This program was in place for a number of years, although there was a period between 2001 and 2005 when many cases also were being exempted from the "supervised recruitment" procedure after requesting a "reduction in recruitment." Under this procedure, the employer is requested to make a specific test of the labor market for the identified position. An advertisement drafted specifically for the identified position is approved by the Department of Labor, and is then placed in an appropriate publication at the direction of the certifying officer. The resumés that are issued as a result are directed to the Department of Labor for review, before being forwarded to the employer for assessment.

In prior supervised recruitment programs, the employer was instructed to place an advertisement in a publication of general circulation for three successive days.

Is Supervised Recruitment Likely?

The Department of Labor has certainly taken note of the turn in the economy, and thus does have a concern that prior recruitment efforts made are not necessarily adequate. Industries that have been of particular focus, such as finance, are more likely to be identified for this

process, particularly in New York, which has been specifically associated with reductions in force in this industry.

Can an Application Be Approved under "Supervised Recruitment?"

Historically, such applications have been successful, as in many cases the employer can show that even though the industry as a whole has had a downturn, there is still a need for certain specialists to maintain the business and generate further income for the company.

If in fact the request for "supervised recruitment" were made, we would, of course, carefully review and assess that case to determine its viability under these new circumstances.

We will continue to monitor trends at the Department of Labor and keep you advised. Please feel free to contact us if you have any additional questions or concerns.

Visa Bulletin Update

The visa bulletin for the month of **March 2009** continues to show availability in all employment-based preference categories, but with little progression. The first employment based preference (EB1) category remains current for all nationalities. The second employment-based (EB2) category for China-born and India-born applicants is up to February 15, 2005 and February 15, 2004, respectively, while all other second preference employment based categories are current. Additionally, immigrant visa availability in the employment based third preference (EB3) categories for professionals or skilled workers alike showed minor progression with China-and India-born applicants at October 22, 2002 and October 15, 2001, respectively; Mexican-born applicants progressed to August 15, 2003; and applicants from all other countries, including the Philippines, remain at May 1, 2005.

Citizenship in Exchange for Army Service

Under a new U.S. Army pilot program, green card holders and nonimmigrant visa holders will be eligible to obtain U.S. citizenship within six months of enlisting. In order to be eligible, non-immigrant visa holders must have been in the U.S. for at least two years at the time of application. The hope is that these individuals' education, foreign language skills, and professional expertise will fill critical Army shortages in medical care, communications and field intelligence. Initially, the program will be limited to 1,000 enlistees nationwide. If successful, the program will be expanded to all branches of the military. In an effort to attract immigrants who have native knowledge of languages and cultures that the Pentagon considers strategically vital, the program also will be open to students and refugees. The program will begin to recruit approximately 550 temporary immigrants who speak one or more of 35 languages, including Arabic, Chinese, Hindi, Igbo, Kurdish, Nepalese, Pashto, Russian and Tamil. Spanish speakers are not eligible. The Army's program also will include about 300 medical professionals to be recruited nationwide. Recruiting will commence after an immigration rule is updated by the Department of Homeland Security.

Because the path to citizenship is long and arduous, it is expected that the offer of expedited citizenship will be a powerful recruiting tool for the military. However, some would-be recruits may be dissuaded by the extent of the commitment: Language experts will have to serve four years of active duty, and health care professionals will serve three years of active duty or six years in the Reserves. Failure to complete the required service honorably would result in a loss of citizenship.

Immigrants' Right to Ineffective Assistance of Counsel Claim Revoked by Attorney General Michael Mukasey

As one of his last acts as Attorney General on January 7, 2009, Michael Mukasey overruled the long-relied-upon holding of *Matter of Lozada*, 19 I & N Dec. 637 (B.I.A. 1988) and found that there is no constitutional right to effective assistance of counsel in removal proceedings (aka deportation proceedings). Specifically, he noted that the U.S. Supreme Court has only recognized constitutional claims for ineffective assistance of counsel when the individual has a right to a government appointed lawyer. Because there is no right to a government appointed attorney in immigration proceedings under the Due Process Clause, foreign nationals are not entitled to effective assistance of counsel or a specific remedy based on the mistakes of the attorney. However, he noted that his determination did not preclude the Department of Justice, in its discretion under "administrative grace", from reopening a removal proceeding in limited circumstances where the foreign national demonstrates that he or she has been prejudiced by the actions of private counsel. He provided an administrative framework for the exercise of such discretion in "extraordinary cases." This change in established precedent has caused an outcry from immigrant advocate groups and immigration practitioners alike. Increasing pressure is being put on the new Obama administration to overturn the former Attorney General's decision.

Harvard Study Shows H-1B Admission Rates Affect Level of Invention and U.S. Technology Advancement

A Harvard University study published in December 2008 to quantify the impact of changes in H-1B admission levels on the pace and character of U.S. invention over the 1995-2006 period, evaluates the impact of high-skilled immigrants on U.S. technology formation. This study found that fluctuations in H-1B admissions levels significantly influence the rate of Indian and Chinese patenting in cities and firms dependent upon the H-1B program, relative to their peers' cities. Specifically, 10% growth in the H-1B population increased Indian and Chinese invention by 6%-12% in the most dependent cities. Moreover, the study found that total invention increases with higher H-1B admission levels primarily through the direct contributions of ethnic inventors.

- The study further found that, while immigrant Scientists and Engineers are central to US technology formation and commercialization. Specifically, immigrants represented 24% and 47% of the US Scientists and Engineers respectively in the workforce with bachelors and doctorate degrees in the 2000 Census. Strikingly, immigrants only make up 12% of the US workforce.

Important Upcoming Dates

- **April 1, 2009:** 2010 H-1B Cap Cases can be received by USCIS.
- **April 3, 2009:** New Form I-9 becomes mandatory.
- **April 15, 2009:** New iCERT online portal makes new LCA form available.
- **May 15, 2009:** All new LCAs must be filed through iCERT.
- **May 21, 2009:** E-verify rule for Federal contractors becomes effective.
- **June 1, 2009:** Western Hemisphere Travel Initiative (WHTI) in full effect. U.S. citizens must carry passport, passport card, or other approved travel document when traveling.
- **July 1, 2009:** New iCERT online portal makes new PERM application available.
- **August 1, 2009:** All new PERM applications must be filed through iCERT.

Immigration and Nationality

The Immigration and Nationality Law Update is published by Proskauer Rose's Immigration Law Practice Group. This newsletter identifies and discusses recent developments relating to the field of U.S. Immigration and Nationality Law, which would be of interest to the corporate employer.

Proskauer Rose LLP counsels corporate clients and their employees in all areas of immigration, nationality and consular law. This includes obtaining work authorizations and visas to enable companies to hire aliens or transfer personnel between nations; compliance with and defense of antidiscrimination and unlawful immigration practices; and advice and appearances in special circumstance matters such as asylum claims and removal proceedings. Much of the work involves obtaining appropriate nonimmigrant or immigrant visas to enable corporations to transfer executives, managers, persons with specialized knowledge, or other key personnel temporarily or permanently to the United States.

For more information about this practice area, contact:

David Grunblatt
973.274.6021 – dgrunblatt@proskauer.com

Avram E. Morell
973.274.3263 – amorell@proskauer.com

Valarie H. McPherson
973.274.6028 – vmcpherson@proskauer.com

Praveena N. Swanson
973.274.3255 – pswanson@proskauer.com