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Immigration and Nationality

Law Update

A report for clients and friends of the Firm

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H-1B Filing Season Is Upon Us!

Believe it or not, the 2009 H-1B filing season is right around the corner. There is no time like the present for employers to activate their focus on organizing and assessing their employment needs for the coming fiscal year. Given the crushing number of H-1B petitions filed last season, we cannot overemphasize the benefits of preparedness. Whether there will be a repeat of last year's fiasco or not, is unpredictable; however, employers should not assume that numbers will be available beyond the beginning of April.

FY 2009 H-1B Nonimmigrant Visa Category and the Cap

On Tuesday, April 1, 2008, U.S. Citizenship and Immigration Services (USCIS) will begin accepting H-1B nonimmigrant visa petitions for Fiscal Year (FY) 2009, which runs from October 1, 2008 to September 30, 2009. Many anticipate that the annual H-1B allocation of 65,000 visas will be exhausted on this very day! In fact, it is anticipated that there will be many more applications than visas available. This is the same scenario as last year, when for the first time, the cap was exhausted on the first day it was possible to file cap-subject H-1B petitions.

Overview of H-1B Nonimmigrant Visa Category

The H-1B nonimmigrant visa category was established by Congress to allow U.S. employers to augment their existing work force with highly skilled temporary international workers with specialized training. The H-1B nonimmigrant visa category is set aside for foreign workers in "specialty occupations" that require a theoretical and practical application of highly specialized knowledge and attainment of a Bachelor's or higher degree in the specialty or its equivalent. This category also includes certain fashion models of "distinguished merit and ability" and up to 100 persons who will perform services of an exceptional nature in connection with Department of Defense (DOD) research and development projects or co-production projects.

H-1B Cap

The H-1B Cap refers to the annual numerical limitation, established by Congress under the Immigration Act of 1990 (IMMACT90), on the number of workers authorized to be admitted to the U.S. in H-1B status or change to H-1B status. The current annual limit set by Congress for the H-1B nonimmigrant visa category is 65,000. Of those 65,000 visas, 6,800 are set aside for citizens of Chile and Singapore under Free Trade Agreements with these countries. An additional set-aside of visa numbers is maintained to accommodate denied H-1B petitions reversed on appeal and improperly rejected petitions.

Exemptions from the Cap

Under the American Competitiveness in the 21st Century Act ("AC21") and other legislation passed by Congress, there are certain types of foreign workers and employers that are exempt from the cap.

1. Foreign workers who have worked as H-1B employees within the past six years, have been counted against the cap, and still have time remaining against their total six-year allotment of H-1B time are exempt from the cap.

2. Foreign workers who are employed by or have received an offer of employment from an institution of higher education, or a related or affiliated nonprofit entity, as well as those employed or who will be employed, by a nonprofit research organization or a governmental research organization are also exempt from the cap.

3. H-1B physicians who have received a J-1 Conrad 30 waiver of the 2-year home residency requirement based on work in a health professional shortage area are also exempt from the cap.

U.S. Graduate Degree

The H-1B Visa Reform Act of 2004 made available 20,000 new H-1B slots for foreign workers with a Master's degree or higher level degree from a U.S. academic institution.

To qualify, the applicant must have, in fact, graduated at the time the H-1B petition is filed with USCIS, or be able to establish that she has completed all the necessary requirements for graduation. It would be rare that an individual in an ongoing Master's degree program would qualify as of April 1, the first date when a petition can be filed for the next fiscal year. Letters from school authorities confirming completion of all requirements subject to any condition subsequent, e.g., passing all exams, would not be acceptable.

Timeframe for Filing H-1B Petitions

The government's fiscal year commences on October 1st, and that is when H-1B visa numbers become available. USCIS will not accept an H-1B petition filed more than six months before the start date of the employment period requested. Thus, if the H-1B cap is exhausted prior to the end of the fiscal year, the earliest a cap-subject H-1B petition can be filed for the next fiscal year, is April 1st. For example, for FY 2006, which ran from October 1, 2005 to September 30, 2006, the supply of available visas was exhausted on August 10, 2005 making it impossible to file new cap-subject H-1B petitions until April 1, 2006 for the 2007 fiscal year, which began on October 1, 2006. The cap has been reached every year since FY 2004 when the number of H-1B visas made available was reduced from a temporary maximum of 195,000, for fiscal years 2001, 2002 and 2003, to 65,000. Additionally, each year since FY 2004, the cap has been reached earlier than the preceding year. For FY 2004, which began on October 1, 2003, the cap was reached on February 17, 2004; for FY 2005, which began on October 1, 2004, the cap was reached on October 1, 2004; for FY 2006, which began on October 1, 2005, the cap was reached on August 10, 2005; for FY 2007, which began on October 1, 2006, the cap was reached on May 26, 2006; and for FY 2008, which began on October 1, 2007, the cap was reached on April 2, 2007, **the first day it was possible to file a petition**. It is anticipated that the demand for H-1B visas will be very high again for FY 2009, which begins on October 1, 2008, and many are predicting that the USCIS will receive sufficient H-1B filings to meet the cap on April 1, 2008, the first day that it again becomes possible to file cap-subject H-1B petitions.

In cases where the H-1B beneficiary has earned a Master's (or higher) degree from a U.S. institution, it may be possible for an employer to file two H-1B petitions for the same employer; first, one under the standard H-1B cap and then later under the Master's degree cap. Last year in particular, this strategy played an important role. As was mentioned above, last year the standard H-1B cap for fiscal year 2008 was reached on the first day of filing, April 2, 2007. However, the H-1B numerical cap for individuals with a U.S. Master's degree was not reached until April 30, 2007. This allowed some petitioners to re-file under the Master's cap after being rejected under the regular cap. It also allowed petitioners to file two simultaneous petitions, one under the standard cap and one under the Master's cap.

USCIS Random Lottery Selection Process

USCIS will monitor the number of cap-subject H-1B filings it receives beginning April 1, 2008, and once a determination has been made that enough cap-subject petitions have been received to meet the cap, USCIS will stop accepting petitions. The date the USCIS determines the cap has been met is known as the "final receipt date." The USCIS will process all cap-subject petitions properly filed prior to the final receipt date and will use a computer-generated random selection process to choose the ones filed on the final receipt date to be accepted for processing. This system selects the exact number of petitions required to fulfill the cap from the ones received on the final receipt date. USCIS will reject petitions not selected and petitions received after the final receipt date that are subject to the cap and return them to the petitioner or their authorized representative together with the filing fees.

If the final receipt date is the same as the first date that petitions may be filed (*i.e.*, April 1, 2008), USCIS will apply the random selection process to the petitions filed on the final receipt date **and** the following day, so as not to disadvantage petitioners filing cases from areas for which overnight delivery cannot be guaranteed. This means that, should the cap be reached on April 1, 2008, the first day filings can be received, USCIS will perform a random selection of petitions filed on April 1st and April 2nd in accordance with the regulations at 8 C.F.R. 214.2(h)(8)(ii).

H-1B's for Recent Graduates – Gaps in Employment

Many H-1B applicants are already on company payrolls working pursuant to their Employment Authorization Documents ("EAD"). It is very important to note that gaps in permissible employment authorization are commonplace, particularly among students in a post-degree optional

practical training period, and should be addressed early on. This is the way the scenario usually plays out. F-1 students are accorded 60 days following completion of their educational program, including practical training to remain in the U.S. in lawful status. The 60 days can be used to prepare for departure or to apply for a change of status. If a student is approved for H-1B status beginning October 1, 2008 and her practical training period expires *prior* to August 1, 2008, that student will not be able to work after that expiration date, and may remain in the U.S. *only for the 60 day grace period* following that day, as accorded by law to F-1 students. In other words, this student would have to leave the U.S. after the 60 day period and apply for the H-1B visa abroad, before returning to undertake H-1B employment in October. On the other hand, if the student's practical training expires *after* August 1, 2008, although she would not be able to work after that date (until the H-1B effective date of October 1, 2008), that student is legally permitted to remain in the U.S. as part of her grace period, until October 1, 2008. In other words, the student does not have to leave the U.S. before undertaking H-1B employment in October.

Update on State Immigration Laws

With no foreseeable progress toward comprehensive federal immigration reform, states continue to develop their own state laws to address immigration-related issues ranging from employment, health, identification, law enforcement, public benefits, and human trafficking. The National Conference of State Legislatures (NCSL) reports that as of November 16, 2007, no fewer than 1,562 immigration-related bills had been introduced across the country, and that 244 of these bills had become law in 46 states. In the beginning of 2008, Arizona, Tennessee, and Minnesota made headlines as state laws that impact employers hiring unauthorized workers became effective.

- **Arizona – Federal Court Upholds AZ Immigration Law:** In the Summer of 2007, Arizona passed what is arguably the toughest law against employers of unauthorized workers. The Legal Arizona Workers Act, effective January 1, 2008, has two key features: 1) It provides business license penalties for employers who knowingly or intentionally hire undocumented workers. 2) It requires all employers to use the federal basic pilot program (also known as E-Verify) to determine an employee's legal status. Businesses and employers who do not comply with the law risk having their business licenses suspended or permanently revoked. On February 7, a federal court in Phoenix upheld Arizona's tough new law and dismissed the lawsuit brought by the U.S. Chamber of Commerce and a number or Arizona business groups who challenged the law's constitutional validity. Specifically, the federal judge rejected claims by the plaintiffs that the Arizona law was preempted by federal law and denied employers due process. The plaintiffs have appealed this decision. However, state attorneys have agreed to not bring enforcement proceedings related to the law until after March 1, 2008. We will keep readers apprised of this quickly developing story.

- **Minnesota – E-Verify Required:** On January 7, 2008, the Minnesota governor signed a new law that requires all executive branch hiring authorities to use the federal E-Verify program. The law also requires that vendors and subcontractors who have state contracts in excess of $50k to certify that they do not knowingly employ persons in violation of U.S. immigration laws, and to also certify that, as of the date services are to be performed, the vendor and all subcontractors have implemented or are in the process of implementing E-Verify. Under the new law, the state may terminate contracts and/or debar a vendor/contractor if the Commissioner of Administration determines that a vendor/contractor has knowingly employed unauthorized workers in violation of federal immigration laws.

- **Tennessee – Prohibits the Knowing Employment of Illegal Aliens:** The Tennessee Illegal Alien Employment Act went into effect on January 1, 2008. The law provides that no individual, corporation, partnership, association, or other legal entity shall knowingly employ, recruit, or refer for a fee an unauthorized alien. An employer will be found to have *not* violated this section if the employer has received and documented the employee's eligibility to work in accordance with the federal I-9 form, even if later the information provided by the employee was found to be false. In addition, an employer will *not* be found to have violated the law if the employer verified the employee's work authorization by using the federal E-verify program. A Tennessee employer who has been found to knowingly employ an unauthorized worker risks having its business licenses suspended.

DHS Publishes Final Rule on REAL ID

In early January, the Department of Homeland Security (DHS) issued regulations implementing the provisions of the REAL ID Act of 2005, which establishes minimum security standards for state-issued drivers' licenses and identification cards. Over the last several years, REAL ID has created a significant amount of controversy.While DHS asserts that REAL ID is a nationwide anti-crime and anti-terror effort, privacy advocates and many states oppose REAL ID measures on privacy, state sovereignty, and discrimination grounds. REAL ID sets out specific requirements that states

must adopt in order to demonstrate compliance: 1) Certain information and security features must be incorporated into each card; 2) Proof of identity and U.S. or legal status of an applicant must be established before a card is issued; 3) Source documents provided by an applicant must be verified; and 4) Security standards must be met by the offices that issue licenses and ID cards.

While REAL ID does not technically require states to comply with these standards, in effect, it forces states to comply with the requirements because, under the rule, a state-issued license or ID must meet REAL ID standards in order to be accepted for official federal purposes, such as boarding a commercial aircraft, entering a federal facility or accessing a nuclear power plant.

Beginning May 11, 2008, individuals from states that are not REAL ID compliant (and have not received extensions of the compliance deadline) will not be able to use their driver's licenses or ID cards for official federal purposes. In the FAQ issued in connection with the regulations, DHS advises that if such individuals do not have other acceptable forms of ID, such as a U.S. passport, they may face additional security screening delays when boarding a federally regulated commercially aircraft or accessing a federal or nuclear facility.

A state that has received an extension by DHS will have until December 31, 2009 to come into compliance with REAL ID standards. Under this first deadline, states must have developed or upgraded its systems to verify the lawful status of all applicants before issuing REAL ID licenses. After this date, a state may also be able to receive a second extension until May 11, 2011 if it can demonstrate significant progress in implementing REAL ID standards.

For certain citizens from states that have firmly rejected REAL ID, including Maine, New Hampshire, South Carolina, Oklahoma, Montana, Tennessee and Washington, the lack of compliant state-issued identity documents could pose problems. We will follow this developing chapter and update our readers on how REAL ID unfolds and is ultimately implemented.

Important Change in International Land and Sea Travel Documents Procedures

Beginning January 31, 2008, the United States ended the practice of accepting oral declarations of citizenship at land and sea borders. Travelers ages 19 and older must now present documentation that proves both identity and citizenship. Identification documents must include a photo, name and date of birth. New document procedures identify about two dozen types of documents that travelers may use to prove citizenship and identity. One of the following documents should be presented to prove both identity and citizenship.

Acceptable Documents as of January 31:

- U.S. or Canadian Passport
- U.S. Passport Card (Available spring 2008)*
- Trusted Traveler Cards (NEXUS, SENTRI, or FAST)*
- State or Provincial Issued Enhanced Driver's License (when available – this secure driver's license will denote identity and citizenship.)*
- Enhanced Tribal Cards (when available)*
- U.S. Military Identification with Military Travel Orders
- U.S. Merchant Mariner Document
- Native American Tribal Photo Identification Card
- Form I-872 American Indian Card
- Indian and Northern Affairs Canada (INAC) Card

*Some of these documents may not yet be available

All existing nonimmigrant visa and passport requirements will remain in effect and will not be altered by the changes that were implemented on January 31, 2008.

March 2008 Visa Bulletin Update

The visa bulletin for March 28 is a "mixed bag." Some quota categories have improved, while others within the employment-based preference categories continue to be severely backlogged.

EB1 and EB2: The first employment-based preference category (EB1) is current for all nationalities. However, the second preference category (EB2) for India-born applicants remains "unavailable," and is expected to stay unavailable for the remainder of this fiscal year (i.e., through September 2008). There is an improvement in the backlog for Chinese-born EB2 applicants, with availability for those with a priority date of December 1, 2003 or earlier. For applicants born in any other country, immigrant visa availability is current in the EB2 category.

EB3: Under the EB3 Professional and Skilled Worker category, the Visa Bulletin shows improvement for *all* nationalities. For Chinese born applicants, there is a progression of 13 months, with availablity for those with a priority date of December 1, 2002, or earlier. For Indian-

born applicants, the Visa Bulletin shows progression of nearly 3 months, with availablity for those with a priority date of August 1, 2001, or earlier. And, there is 1 week progression for Mexican-born applicants. For applicants born in all other countries, the priority date advanced over two years to January 1, 2005.

Other Worker: In addition, the unskilled or other worker category progressed two months, and is available to all applicants with a priority date of January 1, 2002 or earlier.

Recent BALCA Decision: Lesson to Employers on "Good Faith Efforts to Recruit"

Employer's One Minute Telephone Calls to Applicants Inadequate

In a recent Board of Alien Labor Certification Appeals (BALCA) decision, BALCA found that the Department of Labor's Certifying Officer (CO) properly denied a labor certification where it found that the employer failed to demonstrate good faith efforts to recruit U.S. Workers. (*Matter of El Jalisco Mexican Restaurant*, 2007-INA-00010, 12/10/07). The appeals board said, "We concur with the [certifying officer] that the evidence of one minute or less for telephone contact with the applicant is inadequate to establish good faith efforts to recruit."

In this case, which was filed under the pre-PERM procedures, the State Workforce Agency provided the employer with applications of five U.S. workers whose resumes suggested that they met the job's minimum requirements. With regard to these five applicants, the employer's recruitment report stated that three applicants were interviewed, but not hired, and that the remaining two applicants were not interviewed because they were unreachable after six unsuccessful attempts to reach them by phone. However, in the employer's rebuttal submission to the CO's Notice of Findings, the employer submitted phone records that revealed that only a single call to each applicant was made for a duration of one minute or less. On appeal with BALCA, the employer argued that it interviewed the applicants during these brief phone calls, and determined that the applicants were not qualified or interested in the available job.

BALCA held that the employer did not make a good faith effort to recruit and that the employer's argument was inconsistent and lacked credibility. BALCA found that the one minute or less phone calls were insufficient to evaluate the candidates' experience and interest. The appeals board further stated that even if the employer had not actually spoken with the applicants, the failure to send a follow-up letter after the unsuccessful phone attempts also demonstrated a lack of good faith efforts to consider qualified U.S. applicants.

This decision serves as an important reminder to employers and immigration professionals of what constitutes good faith efforts to recruit and what documentation is sufficient to demonstrate such efforts. In the *El Jalisco* decision, the appeals board summarizes the key considerations in establishing "good faith efforts to recruit" as determined in a previous 2001 decision (*M.N. Auto Electric Corp.*): 1) While reasonable efforts are considered within the context of each case's particular circumstances, an employer proves reasonable efforts to contact qualified U.S. applicants when timely, actual contact has been made. 2) In some instances, an employer may need to make more than one type of contact. 3) Unanswered phone calls and messages on answering machines are insufficient where addresses are available for applicants. In these cases, the employer should follow up with a letter, preferably by certified mail and return receipt.

Undocumented Workers Are Employees

Courts are confronted with a serious challenge when trying to balance law and policy which views the undocumented alien as a law violator, with the contravening compelling interest to protect the rights of any individual within the United States workforce. Although federal law prohibits hiring undocumented workers, it also requires companies to bargain with unions that represent undocumented workers and provide them with certain benefits. While Congress remains at an impasse on passing any substantive immigration reform to address some of these issues, federal judges must find their way between conflicting policy considerations and statutes.

A recent example is the ruling in *Agri Processor Co., Inc. v. NLRB*, — F.3d —, 2008 U.S. App. LEXIS 101 (D.C. Cir., Jan. 04, 2008) in which a federal appeals court affirmed that undocumented workers at a kosher meat company are considered employees under federal labor laws. The US Court of Appeals for the District of Columbia ruled that Agri Processor Co. Inc.'s undocumented workers are protected as employees under the National Labor Relations Act and are entitled to representation by the United Food and Commercial Workers Union. The opinion for the majority acknowledged that the Immigration Reform Control Act of 1986 (IRCA) prohibits companies from intentionally hiring undocumented workers but ruled that nothing in the IRCA's text alters the NLRA's definition of an employee. The dissenting opinion contended that the NLRA's definition of an employee must be interpreted in conjunction with U.S. immigration laws. This judge argued that an illegal worker is not an 'employee' under the NLRA because Congress has made it illegal for undocumented aliens to be employed. The current Supreme Court precedent on the issue is the *Sure-Tan*

case that held that the NLRA's definition of employee includes undocumented employees. It seems that until the Supreme Court or Congress acts to limit the scope of the term "employee," we will continue to be faced with such conundrums.

Revised National Security Adjudication and Reporting Requirements for Name Checks Pending over 180 Days

Background checks are conducted by USCIS on all applicants, petitioners and beneficiaries seeking immigration benefits. USCIS' mandate has been that the FBI name check portion of the background check must be completed before any adjudication could proceed on certain application types.

In a February 4, 2008 USCIS memorandum, Michael Aytes, Associate Director of USCIS, modified the existing guidance in this regard, and announced a major shift in the agency's approach to FBI name checks of pending applications. According to the memo, after a FBI fingerprint and other necessary security checks have been completed, and "*the FBI name check request has been pending for more than 180 days, the adjudicator shall approve the application and proceed with the card issuance.*" (Post-audit procedures will be put in place to allow USCIS to revisit cases where the name check uncovers a problem.) This new procedure will apply to Applications for Adjustment of Status (I-485), Applications for Waiver of ground of Inadmissibility (I-601), Applications for Status as a Temporary Resident Under Section 245A of the Immigrant and Nationality Act (I-687), and Applications to Adjust Status from Temporary Permanent Resident (Under Section 245A of Public Law 99-603) (I-698). USCIS will still require name check clearance for Applications for Naturalization (N-400).

The memo affects all applicants whose FBI name check requests have been pending for 180 days. This group also includes applicants with pending district court or court of appeals actions challenging delays in the adjudication of applications.

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