

Immigration and Nationality Law Update

A report for clients and friends

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The DOL Retreats: Regulation of the Attorney-Client Relationship in PERM Processing

On September 17, 2008, the Department of Labor's (DOL's) Employment and Training Administration (ETA) issued a notice stating that it would abandon its June 2008 declaration to audit approximately 2,500 permanent labor certification (commonly known as PERM) applications filed by the immigration law firm of Fragomen, Del Rey, Bernsen & Lowey, LLP. The statement followed several weeks of claims and counterclaims in Fragomen's suit for injunctive relief, originally filed on August 8, 2008.

DOL's September 17th position is a significant retrenchment, one that tacitly recognizes that, in seeking to audit the Fragomen-filed PERMs, the DOL was applying a new interpretation of the boundaries of the attorney-client relationship in the PERM process. Such a change, made without appropriate notice and opportunity for comment, is not permitted.

The September 17th notice states that the DOL "has been presented with evidence indicating that prior to its recent audits, many immigration attorneys believed that the Department's rule regarding consideration of US workers did not apply to them unless they represented not only the employer seeking the labor certification, but also the alien for whom the certification was sought."

The appropriate role of attorneys during the PERM process was outlined in an August 29, 2008 bulletin issued by the DOL's ETA. At that time, DOL clarified what attorney actions would be permissible under the regulations governing PERM labor certification. Parameters included:

- Attorneys and agents may receive résumés and applications of U.S. workers who respond to the employer's recruitment efforts; however, they may not conduct any preliminary screening of applications before the employer does so, other than routine clerical or ministerial organizing of résumés that does not include any assessment of, or comments on, the qualifications of any applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for

which labor certifications are not filed. The attorney or agent may not withhold from the employer any résumés or applications that it receives from U.S. workers.

- Attorneys and agents may not participate in the interviewing of U.S. worker applicants, unless the attorney or agent is the representative of the employer who routinely performs this function for positions for which labor certifications are not filed.

DOL advises that it will continue to audit, and may require supervised recruitment, for an application it determines was filed based on a recruitment campaign that was conducted in bad faith, or in violation of the applicable statutory and regulatory requirements. In evaluating a labor certification application, the DOL will review the manner in which the employer reached its determination that there are no willing, able, qualified and available U.S. workers, including scrutinizing the manner in which the decision was made and whether the employer deviated from its normal course of business in evaluating the qualifications of U.S. applicants.

Furthermore, the September 17th notice reaffirms the applicability of the DOL's August 29th bulletin, and states that an attorney is permitted to "provide advice throughout the consideration process on any and all legal questions concerning compliance with governing statutes, regulations and policies." The guidelines provided in the bulletin will be applied to all PERM applications filed after the August 29th issuance date. All pending PERM applications subject to audit triggered entirely by the earlier interpretation are being released and will be processed in accordance with their original filing date.

The lawsuit filed by Fragomen sought to prevent the DOL from enforcing its novel interpretation of the PERM regulations, specifically, the DOL's ban on attorney-client consultations regarding questions pertaining to PERM recruitment and an employer's review of résumés received during the PERM process. The DOL's acknowledgement that the basis for the audits was neither predictable nor warranted under the circumstances, and its clarification of some of the regulatory parameters of the attorney-client relationship in PERM processing, provides a framework within which an employer and its legal counsel can operate.

Processing Delays

In our last newsletter, we posited that the audits of such a high number of pending PERM applications would result in a growing delay in processing times for all PERM applications. In September, notes and estimated processing times reported at the DOL's July 15, 2008 Stakeholder's Meeting were reported.

DOL stated that of the non-audited "clean" PERM cases, they were then (on July 15th) working on cases that were filed in April 2008. Seventy per cent of clean cases are approved within a 60-90 day time frame, and the remaining 30% are usually resolved within 6 months- 1 year. DOL noted that if 120 days or more have passed since the filing

of the application, and you have received neither an audit nor a final resolution, an inquiry should be made with DOL, and the issue reported.

On audited cases, DOL was then working on cases filed in March 2007. Audited cases are processed in order of priority date. Rule of thumb for inquiring on cases: If it has been more than 15 months and you have not received notice of resolution, an inquiry should be made with DOL, and the issue reported.

DOL reported that there were, as of July 15th, 3,700 appeals pending. Of the appeals, approximately 400 are being processed by the Chicago National Processing Center, with 3,300 at the Atlanta National Processing Center. DOL has divided appeals into 2 queues: (1) Appeals based on a Government error – as of July 15th, DOL was working on cases with a November 2007 filing date, and (2) All other appeals - currently working June 2006.

We will keep you apprised of all updates on PERM processing, as they arise.

ACLU Sues To Invalidate Rhode Island's E-Verify Law

On September 5, 2008, the American Civil Liberties Union (ACLU) of Rhode Island filed a lawsuit in state court, challenging the constitutionality of that state's Executive Order 08-01. On May 15, 2008, Executive Order 08-01 made it a requirement for state contractors and vendors to enroll in E-Verify. In its complaint, ACLU argues that Rhode Island's governor exceeded his authority under the state's constitution in issuing the Executive Order, because the authority to enact laws related to state contracts falls within the General Assembly's domain. Additionally, ACLU argues that the Executive Order failed to comply with state requirements to provide notice and a comment period for interested parties before dissemination of a law. Finally, ACLU finds the Executive Order modifies the terms of existing contracts, which is prohibited by the state constitution. ACLU has requested that enforcement of Executive Order 08-01 be prohibited. At this time, the Executive Order remains in effect.

October 2008 Visa Bulletin

The Visa Bulletin describes the specific quotas for immigrant visas (green cards) made available annually, by country, for each immigrant visa category. A category may become backlogged if there is more demand for immigrant visa slots than immigrant visas available. The priority date, the date on which the first application in the multipart green card process was received by the government office, determines an individual's place in line for an immigrant visa. Each month, the Department of State (DOS) informs the public through its Visa Bulletin of the status of the wait lists for the various immigrant visa categories by listing the priority dates that have been reached in each category. Once an individual's priority date has been reached, s/he can apply for the final stage of the green card application process – adjustment of status to permanent residence or an application for an

immigrant visa at a U.S. Consulate. At times, the demand for immigrant visas exceeds DOS's expectations and the published priority dates listed move back, rather than forward, from month to month. This phenomenon is known as "retrogression," and has occurred a number of times over the last two years.

The visa bulletin for the month of **October 2008**, the first month of the 2009 Fiscal Year, shows availability in all employment-based preference categories. The first employment-based preference category (EB1) remains current for all nationalities. Notably, the second preference category (EB2) for India-born and China-born applicants experienced a retrogression, with immigrant visas available for applicants with a priority date of April 1, 2004 (China-born) and April 1, 2003 (India-born), or earlier. For applicants born in any other country, immigrant visa availability in the EB2 category remains current.

In this new Fiscal Year, immigrant visas are again available in the various employment-based third preference (EB3) categories. For the EB3 professionals or skilled workers, green cards are available for the following priority dates (or earlier): July 1, 2001 (India), October 1, 2001 (China), July 1, 2002 (Mexico), and January 1, 2005 (all other nationalities). For the EB3 unskilled worker category, green cards are available for those with a priority date of January 1, 2003 or earlier, for all nationalities.

CBP Announces Opening of NEXUS Joint Enrollment Center in Niagara Falls

On September 2, 2008, Customs and Border Protection (CBP) announced the opening of a joint NEXUS Enrollment Center in Niagara Falls, NY. This is the second "Trusted Traveler" Enrollment Center within the Port of Buffalo; the first is in Fort Erie, Ontario, located just across the Peace Bridge. The new Enrollment Center is intended to make acquiring a NEXUS border-crossing card more convenient for residents on both sides of the border. The new center provides a second location for a NEXUS holder to renew his application, a process that must be completed every five years.

NEXUS is a joint CBP-Canada Border Services Agency (CBSA) program that the American and Canadian governments implemented to improve border security while making border crossings easier for pre-approved, low-risk travelers. The NEXUS program permits pre-screened, low-risk travelers to be processed with little or no delay by U.S. and Canadian immigration officials. There are about 225,000 U.S. and Canadian citizens/residents currently enrolled in the NEXUS program. Locally, CBP and CBSA have enrolled over 38,000 individuals in NEXUS, and the new Niagara Falls facility is intended to provide increased enrollment capacity and accessibility in preparation for the expanded Western Hemisphere Travel Initiative (WHTI) identity document requirements that will become effective on June 1, 2009.

As of June 1, 2009, a traveler will be required to present a valid and acceptable document that proves both identity and citizenship when entering the U.S. by land or sea. These

documents may include a passport, the new U.S. passport card, a new state-issued enhanced driver's license, and one of the two Trusted Traveler Program cards (NEXUS or FAST). Travelers entering the U.S. by air are already subject to this requirement.

NEXUS members can use dedicated lanes at the Peace Bridge and Rainbow Bridge border crossings. The Whirlpool Bridge is a NEXUS-only crossing, the only border crossing between the countries to be designated as such. Travelers can apply online at

www.nexus.gov.

E-Verify for Students in Curricular Practical Training

Curricular Practical Training (CPT) is employment that is part of a student's specified degree curriculum. The school's Designated School Official (DSO) authorizes CPT for a student prior to her commencement of work by annotating her Form I-20 (Certificate of Eligibility for F-1 Student Status) in accordance with the applicable immigration regulations. Unlike Optional Practical Training (OPT), an Employment Authorization Document (EAD) card, issued by the USCIS, is not required for a student to work pursuant to CPT. This raises two questions, which were posed to the Department of Homeland Security (DHS).

The questions, and DHS's responses, are below:

1. Is an employer who is enrolled in E-Verify required to put CPT students through the E-Verify system?

DHS Answer: "Yes, an employer must run E-Verify queries on CPT students."

2. If yes, is the E-Verify system capable of automatically checking the student's I-20 to produce an automatic confirmation of employment eligibility?

DHS Answer: "No, the system cannot automatically check a student's I-20. E-Verify does not currently access SEVIS during the automated first step of the verification process. Students under CPT will always be sent to secondary verification. He or she should, however, have employment eligibility confirmed within 24 hours provided his/her record can be located in SEVIS during secondary verification."

Based on these responses, an E-Verify employer who hires a foreign student pursuant to a period of CPT should expect to receive a "tentative nonconfirm" response on that employee's verification, but should receive confirmation of work authorization after a short delay.

Arizona's Employment Verification Law Upheld

On September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit upheld Arizona's Legal Arizona Workers Act in deciding *CPLC v. Napolitano* (No. 07-17272 D.C. No., CV-

07-01355-NVW, Decided September 17, 2008). For background, the Legal Arizona Workers Act went into effect on January 1, 2008, prohibiting the employment of unauthorized foreign nationals in Arizona, and requiring all employers doing business in the state of Arizona to validate the work authorization of all new hires using DHS's E-Verify system. The law also specifies penalties for employers who knowingly employ unauthorized workers. Penalties for a first-time offender include having its business license suspended, and a second offense can lead to permanent revocation of an employer's license to conduct business in Arizona.

We will provide you with further information as we review and digest this case.

Diversity Visa (DV) Lottery Instructions and Results

The DV-2010 Lottery online entry begins at Noon EDT on October 2, 2008, and ends at Noon EST on December 1, 2008. The program, which also is known as the diversity visa lottery, permits 50,000 randomly selected foreign nationals to apply for an immigrant visa or adjustment of status during Fiscal Year 2010 (October 1, 2009 through September 30, 2010). For DV-2010, nationals of the following countries will not be eligible to apply: Brazil, Canada, China (mainland-born), Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, India, Jamaica, Mexico, Pakistan, Philippines, Peru, Poland, South Korea, United Kingdom (except Northern Ireland) and its dependent territories, and Vietnam. Individuals born in Hong Kong SAR, Macau SAR and Taiwan will be eligible, as are applicants born in Russia and Kosovo. Information and instructions for the DV-2010 lottery are posted at the website

http://travel.state.gov/visa/immigrants/types/types_1318.html.

The results for DV-2009 Lottery can be viewed at

http://travel.state.gov/visa/immigrants/types/types_1322.html. DV-2009 lottery winners were notified by mail between May and July 2008, and will be provided further instructions, including information on fees connected with immigration to the U.S. Those selected in the random drawing are not notified by e-mail or mail. Individuals that have not been selected will not receive any notification. Individuals who have been selected for the DV lottery may only file their Adjustment of Status applications, or be scheduled for their final consular interview, when there is a DV immigrant visa available to them, and all processing must be completed before the end of the fiscal year on September 30th. Fiscal Year 2009 runs from October 1, 2008 through September 30, 2009.

House Passes Humanitarian Benefits Bill

On September 17, 2008, the House passed a bill (H.R. 2608) that would provide a two-year extension of benefits under the Supplemental Security Income (SSI) Program for elderly and disabled refugees, asylum seekers, and victims of trafficking who are younger than 18 or older than 70.

At present, the SSI program offers benefits for seven years to eligible, low-income immigrants, with the understanding that they will apply for citizenship while covered under the program. This bill would extend the period of eligibility to nine years.

The bill was previously passed by the Senate on August 1st. On September 23, 2008, the final bill was presented to President Bush, who is expected to sign the bill into law

18-Month Extension of Temporary Protected Status for El Salvador

U.S. Citizenship and Immigration Services (USCIS) announced on September 24, 2008 that it will extend Temporary Protected Status (TPS) for nationals of El Salvador from March 10, 2009 through September 9, 2010. Individuals in TPS status will therefore be permitted to re-register and maintain their status for an additional 18 months. There are approximately 229,000 nationals of El Salvador (and people having no nationality who last habitually resided in El Salvador) who are eligible for re-registration. TPS does not apply to Salvadoran nationals who entered the U.S. after February 13, 2001.

The re-registration period will begin on the day it is published in the *Federal Register* and will remain in effect for 90 days thereafter. Salvadoran TPS beneficiaries are encouraged to apply as soon as possible following the start of the 90-day re-registration period.

TPS beneficiaries must submit an Application for Temporary Protected Status, Form I-821, without the application fee, and an Application for Employment Authorization, Form I-765, for data-gathering purposes only, to re-register for TPS. However, applicants seeking an extension of employment authorization through September 9, 2010 must submit the required application filing fee with Form I-765. Additionally, the biometric service fee must be submitted by all re-registrants over 14 years of age.

New Naturalization Test

On October 1, 2008, USCIS will start administering a new Naturalization Test to Lawful Permanent Residents who are applying for citizenship. Historically, USCIS has tested individuals wishing to become U.S. citizens on their knowledge of civics and their understanding of the English language. The civics portion includes questions regarding the American Government, Integrated Civics, and American History. USCIS compiled data from two separate studies in order to determine which questions to include, which to revise, and which to eliminate. The new test will continue to cover 100 questions. Although USCIS asserts that the new test has been redesigned to be “fair, standardized, and meaningful” to applicants, it is viewed by many as more difficult due to its more conceptual approach to framing questions. In order to pass the civics portion of the test, applicants must correctly answer 6 out of 10 questions selected by the interviewer from the 100 covered. The English language portion of the test addresses the individual’s ability to read,

write, and speak ordinary English. For this section, applicants must correctly read and write 1 out of 3 sentences. The speaking portion is administered orally throughout the exam.

Seniors 50 years or older who have lived in the U.S. as legal permanent residents for a period totaling 20 years or more are exempt from the English test but are still required to take the civics test in a language of their choice. Those 55 years or older who have lived in the U.S. as permanent residents for an accumulated period of at least 15 years may also take the civics test in another language and are not required to pass the English test. Individuals 65 years or older who have lived in the U.S. as permanent residents for periods totaling 20 years or more are likewise not required to pass the English test. They are given a simplified American Civics exam comprised of 10 questions selected by the interviewer from only 20 questions out of the original 100. These 20 questions are identified on the test by an asterisk (*) for the applicant to study and they must still answer 6 out of the 10 questions correctly in a language of their choice.

Although the new Naturalization Test will become effective this October 1st, the previous test will still be available to some applicants. If you filed Form N-400 prior to October 1st, 2008 and the date of your initial exam was also before October 1, 2008, you will need to take the current test. If you filed before October 1, 2008 and your initial exam is on or after that date and up until October 1, 2009, the applicant will have the choice of either the current test or the redesigned one. However, if you file Form N-400 after October 1st, 2008, you will be required to take the redesigned test, without exception. For more detailed information regarding the Redesigned Naturalization Test and various study materials, please visit: www.uscis.gov.

New Filing Instructions for Form N-400 Application for Naturalization

USCIS has announced a revision to the Direct Mail Program for submitting most Form N-400 “Applications for Naturalization” starting October 14, 2008. The completed application must be mailed to a designated lockbox facility instead of a Service Center, determined by the applicant’s home address. USCIS stated that for the first 30 days after October 14, 2008, up to November 13th, they will forward improperly filed applications to the correct facility. After that date, they will return any improperly filed applications with an explanation and specific instructions as to where to re-submit them.

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.

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