Proskauer

Immigration & Nationality Law Update

Spring 2009

REMINDER: Western Hemisphere Travel Initiative (WHTI) Takes Full Effect on June 1, 2009

On June 1, 2009, the final phase of the Western Hemisphere Travel Initiative (WHTI) will go into effect. As of that date, all travelers to the U.S. from Canada, Mexico and the Caribbean, entering at land or sea ports, must present documents showing both identity and citizenship. Such documents have been required for travelers entering by air since January 23, 2007. Acceptable documents vary based on the traveler's citizenship, but, among others, they include: a valid passport, a U.S. passport card, a U.S. or Canadian Enhanced Driver's License, a trusted traveler (NEXUS, FAST or SENTRI) program card, and a U.S. Lawful Permanent Resident Card.

New Exchange Visitor Skills List Effective June 28, 2009

On April 30, 2009, the Department of State (DOS) published a revised Exchange Visitor Skills List. The Exchange Visitor Skills List is a list of specialized knowledge or skills that are deemed to be necessary for the development of a country. The new Skills List will become effective on June 28, 2009, and will apply to exchange visitors who acquire J-1 status on or after June 28, 2009. Exchange visitors who acquire the status prior to the effective date will continue to be governed by the 1997 Exchange Visitor Skills list.

The two primary changes in the new Exchange Visitor Skills List are reflected in a new coding system that lists the specialized knowledge and skills, and the removal and addition of a number of countries to the list. Prior editions of the Exchange Visitor Skills list, first published in 1972, used a unique coding system. In the revised Exchange Visitor Skills List, the DOS will utilize the same codes employed by the SEVIS system, the Classification of Instructional Programs Codes (CIP). Countries added to the list include Armenia, Belize, Cambodia, Djibouti, East Timor, Eritrea, Georgia, Haiti, Kenya, Kosovo, Montenegro, Mozambique, Namibia, Palestinian Authority, South Africa, and Tajikistan. Countries that have been removed from the list include: Afghanistan, Azerbaijan, Bahamas, Botswana, Burundi, Central African Republic, Chad, Cote d'Ivoire, Croatia, Czech Republic, Guinea, Hungary, Jordan, Kuwait, Lesotho, Macedonia, Madagascar, Malta, Morocco, Pakistan, Panama, Papua New Guinea, Poland, Qatar, Sierra Leone, Singapore, Somalia, Sudan, Tunisia, Uganda, Western Samoa, and Zimbabwe.

The Exchange Visitor Skills List is one of several ways that a J-1 exchange visitor might be subjected to the Immigration and Nationality Act Section 212(e) rule, requiring the individual to reside and be physically present in his country of nationality or last permanent residence after completion of the J-1 program for an aggregate of two years before he may be granted status as a permanent resident, or as an H, L or K nonimmigrant. Other ways to become subject to the "foreign residence rule" include receipt of certain government funds to participate in the program, or entrance to the U.S. to receive graduate medical education or training. Under the rule, a J-1 nonimmigrant who is a participant in an Exchange Visitor Program involving a designated specialized knowledge field or skill on the Exchange Visitor Skills List is deemed subject to the two-year home country residence requirement.

The impact of this rule is particularly relevant to an employer when planning to hire or transfer an individual in H or L status when the foreign national may be subject to this rule, but has not satisfied the requirement. A waiver of the two-year home country residency requirement may be available to the individual. An Exchange Visitor may request that the two-year home residence requirement be waived on the following bases: a) The Exchange Visitor's home country has stated that it has no objection to the waiver of the two-year residency requirement; b) an interested U.S. government agency has made a request for a waiver for the sake of public interest; c) if the Exchange Visitor believes that he will be persecuted based on his race, religion, or political opinion upon return to his home country, the individual may apply for a persecution waiver; d) an Exchange Visitor may apply for an exceptional hardship wavier if he can demonstrate that his departure from the U.S. would cause exceptional hardship to his U.S. citizen or lawful permanent resident spouse or child; or e) a foreign medical school graduate can request a waiver in limited circumstances from a designated state department of public health.

DOS Final Rule on Repeat J-1 Visas for Au Pairs

The DOS’s final rule on au pairs was issued, and became effective, April 8, 2009. The rule permits an au pair, who is within the regulatory age range of 18-26 and who has successfully completed the au pair program to repeat the program as long as she has lived outside the U.S. for a period of at least two years after the completion of an initial au pair program, including the educational component. Participants in the au pair program must be proficient in spoken English, and are required to complete at least six hours of academic credit or its equivalent at an accredited U.S. post-secondary educational institution. In finalizing the rule, DOS reasons that an au pair who has previously participated in the program is likely to be familiar with American culture (thereby quickly overcoming cultural challenges), is a proven successful caretaker, and will be able to build on the skills previously acquired.

2010 H-1B Cap Not Met! USCIS Continues To Accept Petitions

You have read the headlines correctly! In the last two years, both the regular H-1B cap of 65,000 and the "U.S. Master's Degree" cap of 20,000 were reached and exceeded during the *initial* filing period which resulted in a lottery selection of petitions. However, this year USCIS has announced that the H-1B cap has not been met and that it continues to accept 2010 H-1B petitions under both the regular and Master's cap. In the most recent count issued by USCIS, on May 22, 2009, USCIS announced that it had received approximately 45,700 H-1B cap-subject petitions and approximately 20,000 petitions qualifying under the Master's degree exemption. USCIS has indicated it will continue to accept H-1B Master's degree cases since it is likely that some of the received petitions will be denied. We expect to see some upturn in filings once bachelor degree program commencements are held over the next month.

While H-1B availability may be good news for some employers, it most significantly is also a sign of the economic downturn. Despite the slow usage of the numbers to date, we still expect that the available H-1Bs will be exhausted before the Fiscal Year actually begins on October 1st – and almost certainly none will be on hand when the economy is predicted to start a true recovery in late 2009 and early 2010. It seems like a very long time ago that an employer could simply file an H-1B petition whenever it identified a foreign worker it wanted to employ who needed the visa category to work. We hope to see those days again.

Important Reminders Regarding F-1 Students & H-1B "Cap Gap" Issues

Under "cap gap" regulations issued last year, certain F-1 students with pending or approved H-1B petitions are allowed to remain in F-1 status during the period of time when an F-1 student's status and work authorization would otherwise expire, up through the start of their approved H-1B employment. The new regulations provide a useful mechanism for filling the "gap" between the end of a student's F-1 status and the beginning of H-1B status.

An F-1 student whose post-completion Optional Practical Training (OPT) expires between April 1, 2009 and September 30, 2009, and who has filed a petition for a change of status to H-1B with USCIS, will *automatically* have her F-1 status and work authorization extended through September 30, 2009, unless the H-1B petition is later denied or revoked. An F-1 student who was within her 60 day grace period at the time of filing the H-1B petition will only receive an automatic extension of her F-1 status through September 30, 2009, and will not receive a new period of work authorization.

While a student's status is automatically extended under the cap gap provisions, it is the student's responsibility to contact her school's Designated School Officer (DSO) to ensure that her SEVIS record properly reflects her current status. If the student's SEVIS record is inaccurate, the student should ask the DSO for a "data fix," and provide evidence that she is entitled to an extension (*i.e.*, a copy of the H-1B receipt notice or approval notice).

Generally, any student who seeks to travel outside of the U.S. while working on her OPT must be in possession of a valid visa and SEVIS authorization to return to the U.S. If the student is in the U.S. and working pursuant to the "cap gap" rule, however, she will not be able to return to the U.S. until an H-1B visa is issued in her passport. As H-1B petitions typically have October 1st as the initial validity date, the earliest the student could return to the U.S. in H-1B status would be September 20, 2009, ten days before the start of the petition, and she could not begin working until October 1, 2009. It is therefore important for employers and student workers to carefully consider the implications of travel during the cap gap extension period *prior* to the student leaving the U.S., and to address and adjust travel plans accordingly.

Department of Homeland Security Announces New Worksite Enforcement Strategy

On April 30, 2009, the Department of Homeland Security (DHS) announced a new worksite enforcement strategy that specifically targets employers who knowingly hire undocumented workers. To date, worksite enforcement actions have generally focused on the arrest and removal of illegal workers. The new DHS strategy now also centers on the criminal prosecution of employers who are not compliant with immigration laws. In addition, DHS confirms that the U.S. Immigration and Customs Enforcement (ICE) will continue to use all available civil and administrative tools, including civil fines and debarment, to deter illegal employment. DHS describes this new guidance as part of an "effective, comprehensive worksite enforcement strategy that must address both employers who knowingly hire illegal workers as well as the workers themselves." While the specifics of the new field guidance distributed to ICE have not been made public, DHS has announced that ICE officers will be held to high investigative standards and existing humanitarian guidelines. ICE will look for the mistreatment of workers, trafficking, smuggling, harboring, visa fraud, and other criminal conduct. Reaction from the immigration community has been mixed. While some applaud the shift in priorities, others readily acknowledge that this change can not make up for an overall broken U.S. immigration system.

On May 4, 2009, the U.S. Supreme Court ruled on the issue of when an illegal worker who uses a Social Security number that is not her own may be charged with identity theft. In *Flores v. Figueroa*, No. 08-108 (Sup. Ct. May 4, 2009), the Court said that a federal statute prohibiting aggravated identity theft "requires the Government to show that the defendant knew that the means of identification at issue belonged to another person." This finding limits ICE's ability to charge any illegal worker using another person's Social Security number with identity theft unless the agency can show that the worker knows specifically that the number belongs to another identifiable individual.

It is expected that ICE will continue its enforcement efforts at employers in the hospitality, manufacturing, food processing, and agricultural industries. However, the new worksite enforcement move by DHS is a reminder to all employers regarding the importance of developing and employing a robust and comprehensive immigration compliance program. If you are interested in learning how the new DHS policy could affect your workplace or how to improve your company's immigration compliance policy, please contact Proskauer's Immigration Practice Group.

Comprehensive Immigration Reform and the Dream Act

The Obama Administration has stated its support for comprehensive immigration reform that provides a path to citizenship for illegal immigrants already living in the U.S. The Administration favors legislation that will legalize immigrants, but impose fines and other penalties for having previously violated the law. In addition, two significant labor unions – the AFL-CIO and Change to Win – have joined together to support comprehensive immigration reform. The groups have put together a framework for comprehensive immigration reform legislation, and argue that a broken immigration system is not working for anyone–neither exploited immigration workers nor those born in the United States whose living standards are being undercut by the creation of a new underclass. While there remains a vast gulf among the varying viewpoints and special interests involved in the immigration debate, we are heartened that the issue remains on the political agenda, and hope to see further dialogue on how to fix the immigration system in a meaningful way.

Senators Dick Durbin (D-IL) and Richard Lugar (R-IN) and U.S. Reps. Howard Berman (D-CA) and Lincoln Diaz-Balart (R-FL) re-introduced the Development, Relief and Education for Alien Minors Act (the “DREAM Act”). Children account for approximately 1.8 million of the undocumented immigrants living in the U.S. These children have grown up and received much of their education in this country. However, without lawful status in the U.S., they are often prevented from seeking higher education or serving in the military. Under this legislation, undocumented immigrant children would obtain citizenship by meeting certain criteria: They must have come to the U.S. before they turned 16, be under the age of 30 at the time of application, have lived in the U.S. for at least five years, graduated from high school or passed an equivalency exam, have “good moral character,” and either attend college or enlist in the military for two years. An estimated 65,000 undocumented young people would be impacted annually by this important piece of legislation.

Also re-introduced this month is AgJobs – an agricultural guest worker bill that has been considered, in similar content and form, numerous times over the past six years. This year’s version was offered by Senator Dianne Feinstein (D-CA), who says the bill is needed to keep farms in business. The legislation combines streamlining the existing H-2A guest-worker visa program with a plan to legalize farm workers already in the U.S. illegally.

We will keep you apprised of all new legislative efforts as this Congress proceeds.

Spotlight on State Immigration Laws

As Congress continues its debate about comprehensive immigration reform, states are tackling the issue within their borders by introducing and passing immigration-related legislation. The result is a patchwork of state immigration laws with different focuses and requirements. The National Conference of State Legislatures reported in 2008 that at least 1,305 pieces of legislation related to immigrants and immigration had been introduced, with a total of 206 laws and resolutions enacted nationwide. The first quarter of 2009 also has seen comparable activity, with 25 states enacting 35 laws and adopting 40 resolutions. The primary policy areas of focus continue to be employment, identification/drivers licenses, law enforcement, education, health, and benefits for immigrants.

Arguably one of the most significant aspects of the state laws is the mandated use of E-Verify. The E-Verify program is an Internet-based system established by the DHS, in partnership with the Social Security Administration (SSA), to verify employee eligibility to work in the U.S. Under federal law, participation in the E-Verify program is currently voluntary. However, Arizona, Mississippi, and South Carolina have enacted laws that require all employers to use E-Verify. Nine other states have adopted some variation of the requirement. For example, Rhode Island requires executive agencies and all persons and businesses doing business with the state, including grantees, contractors, subcontractors, and vendors, to use the E-Verify program. Colorado requires employers who contract with its state agencies to participate in E-Verify. The Colorado law also requires state contractors to make certified attestations that it will participate in E-Verify and that it does not knowingly employ unauthorized workers.

Summary of States Requiring E-Verify

STATE	ALL Employers Required To Use E-Verify	State Public Employers/Agencies Required To Use E-Verify	State Public Contractors Required To Use E-Verify

Arizona	**X**	**X**	**X**
Colorado			**X**
Georgia		**X**	**X**
Idaho		**X**	**X**
Minnesota		**X (for Executive Branch employees)**	**X (with $5C contracts)**
Mississippi	**X**	**X**	**X**
Missouri		**X**	**X**
North Carolina		**X**	
Oklahoma		**X**	**X**
Rhode Island		**X (executive agencies)**	**X**
South Carolina	**X**	**X**	**X**
Utah		**X**	**X**

The question of whether these state immigration laws are preempted by federal law is currently being litigated. The Immigration Reform and Control Act of 1986 (IRCA) has a specific provision that preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens. We summarize below some significant updates on how courts are treating E-Verify state laws.

Arizona: On September 17, 2008, the U.S. Court of Appeals for the Ninth Circuit upheld the Legal Arizona Workers Act (LAWA) which required all employers to participate in E-Verify as of January 1, 2008. On March 9, 2009, the Ninth Circuit denied the Plaintiff's request for a rehearing. The court held that LAWA was not preempted by federal law because it was a "licensing measure that fell within the savings clause of the Immigration Reform and Control Act of 1986."

Illinois: In 2007, Illinois enacted a law that prohibited its employers from enrolling in E-Verify until the program's accuracy and timeliness issues were resolved. In September 2007, DHS sued Illinois, claiming that the statute was invalid under the Supremacy clause. While the law was to take effect on January 1, 2008, the state agreed not to enforce the statute until the lawsuit was settled. Most recently, on March 12, 2009, the U.S. District Court for the Central District of Illinois sided with DHS, and struck down the Illinois E-Verify law as unconstitutional.

Oklahoma: In June 2008, the Federal District Court for the Western District of Oklahoma issued a preliminary injunction postponing portions of the state law that required employers doing business with the state to use E-Verify. Contrary to the Arizona decision, the court found that the Oklahoma law contained provisions that were "substantially likely" to be deemed unconstitutional and preempted by federal law.

Rhode Island: On April 3, 2009, the Rhode Island Superior Court upheld the governor's executive order that required vendors doing business with the state to utilize the E-Verify program. The court rejected claims by the ACLU that the executive order violated the separation of powers doctrine and the contract clause of the Rhode Island Constitution, and that the governor exceeded his executive authority.

New Jersey Governor's Blue-Ribbon Panel on Immigration Reform

N.J. Governor John Corzine created a Blue-Ribbon Panel on Immigration Reform in August 2007 to examine state issues as they relate to immigrants. The Panel's mission was to develop recommendations for a comprehensive and strategic statewide approach to successfully integrate immigrants into New Jersey's population. The Panel's full report is now available at http://www.nj.gov.

The Panel was asked to make recommendations for a statewide approach to integrate its growing immigrant population. In New Jersey, immigrants make up more than 20 percent of the population, and their households tend to be larger. Notably, nearly one-third of all children in New Jersey live in immigrant families, and are more likely to live in poverty.

The Panel made goals for the following sectors: social services and public benefits; education; immigrant workforce and labor; and state and local government best practices. The Panel also identified two issues that fell beyond the scope of an individual subcommittee: in-state tuition at post-secondary institutions for immigrant students and the establishment of an Office of Immigrant Affairs.

Overall, the Panel has been a success and has received a lot of positive attention since the report was released on March 30, 2009.

Secure Flight Launched

The Transportation Security Administration (TSA) announced in late March that its new Secure Flight program is operational. Under Secure Flight, TSA has taken over terrorist watch list screening for four domestic airlines and expects to be screening all domestic flights by early 2010 and international airline passengers by the end of 2010. Since the terrorist attacks of September 11, 2001, airlines have been responsible for checking passenger names against federal terrorist watch lists. With Secure Flight, this responsibility shifts from individual aircraft operators to TSA. However, airlines will need to gather a passenger's full name, date of birth, and gender when making airline reservation to determine if the passenger is on a "no-fly" or watch list. The program is designed to improve TSA's responsiveness to potential security threats.

CBP Deactivates Old NEXUS Cards as of May 1st

As of May 1, 2009, U.S. Customs and Border Protection (CBP) will cancel and deactivate old NEXUS cards for current NEXUS members. Since November, CBP has been sending new NEXUS cards with enhanced security features to existing U.S. and Canadian members. NEXUS members should destroy old cards and activate their new cards within 30 days of receipt.

May and June 2009 Visa Bulletin Update on Employment-based Categories

The most significant news under May's Visa Bulletin is that all of the employment-based third preference catetory (EB-3) became unavailable for the first time in FY 2009. DOS has indicated that the EB-3 visa category is expected to remain unavailable for nationals of all countries through the end of the fiscal year, September 30, 2009.

The June 2009 Visa Bulletin reflects the continuing unavaibility of visa numbers for EB-3 category. In addition, Indian-born applicants in the employment-based second preference category (EB-2) experienced a deep retrogression, with availability limited to applicants with a priority date of January 1, 2000, from February 15, 2004 in the prior Bulletin. Availability for EB-2 applicants born in Mainland China remained static for those with a priority date of February 15, 2005 or earlier. The EB-2 category is current for all other countries of chargeability. The employment-based first preference category (EB-1) remains current for all areas of chargeability.

The Department of State announced that the demand for visa numbers, particularly adjustment of status cases, has been extremely heavy during the year. As a result, DOS warns that visa availability during the final quarter could become limited as categories approach their annual numerical limits.

Processing Times for Agencies Involved In the Immigration Process

USCIS is striving to reduce processing times by an average of 20 percent by the end of the FY2009 (September 30, 2009) as required under the 2007 rule amending filing fees for petitions and applications filed with the agency. Although USCIS has not yet achieved its goals, the agency has stated that it continues to work towards them, and it believes processing times will fall to the prescribed levels by September 30th. For a complete listing of the Processing Times Goals, please visit www.uscis.gov.

After what feels like a long time of nothing much happening, the Department of Labor (DOL) has made a concerted effort to process pending PERM labor certification applications. As of April 30th, DOL is currently reviewing cases that were filed in November 2008. DOL is processing audited cases with a filing date of September 2007, and appealed cases with a filing date of June 2007. Approximately 26% of the PERM cases currently filed are being audited.