Proskauer

Immigration & Nationality Law Update

June/July 2008

Travel Under The Visa Waiver Program: Introducing ESTA

The U.S. permits citizens of 27 countries to enter the U.S. without a visa under the Visa Waiver Program (VWP) for tourism or business for stays of 90 days or less without obtaining a visa. The program was established in 1986 with the intention of removing unnecessary barriers to travel, stimulating the tourism industry, and permitting the Department of State (DOS) to focus consular resources in other areas. Citizens of the following countries are eligible for visa free travel to the US if they meet certain criteria: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. VWP entrants must present a machine-readable passport (MRP) valid for six months past their expected stay in the U.S. During fiscal year 2007, more than 15 million visitors from VWP countries entered the U.S.

On June 3, 2008, the Department of Homeland Security (DHS) introduced a new online system called the Electronic System for Travel Authorization (ESTA), a fully automated, electronic system for screening passengers prior to their travel to the U.S. under VWP. On August 1, 2008, DHS will begin to accept voluntary applications through the ESTA Web site at https://esta.cbp.dhs.gov/. It is predicted ESTA will be mandatory for all VWP travelers starting January 12, 2009.

Nationals of VWP countries who plan to travel to the U.S. under the VWP will need to receive an electronic travel authorization prior to boarding a U.S.-bound airplane or cruise ship. Instead of completing form I-94W (which requires biographical, travel, and eligibility information) while traveling to the U.S., ESTA will require citizens of VWP countries to complete an electronic application that requests the same information as the I-94W form prior to departure, and await authorization. Until ESTA is mandatory for all VWP travelers, all foreign nationals will continue to complete I-94W forms en-route to the U.S., to present at a U.S. port of entry.

By using the ESTA program, DHS seeks to determine if an individual is eligible for entry to the U.S. without a visa, and whether such travel poses any security threat to the U.S. prior to the arrival of the foreign national. An ESTA application may be submitted at any time prior to travel to the U.S., and once approved, it will be valid for multiple entries up to two years or until the foreign national's passport expires, whichever comes first. DHS recommends that ESTA applications be submitted at least 72 hours prior to travel.

Once ESTA is mandatory, all travelers from VWP countries will be required to obtain an ESTA approval before boarding a carrier to travel by air or sea to the U.S. pursuant to the VWP. In the event that an ESTA applicant is denied authorization to travel to the U.S. under the VWP, he or she will be referred to DOS's Bureau of Consular Affairs website (www.travel.state.gov) for information on how to apply for a visa to travel to the U.S. This process is similar to the existing practice, in which VWP travelers who arrive at a U.S. port of entry and are determined by U.S. Customs and Border Protection (CBP) to be ineligible for admission under the VWP, may be returned to their country of origin to submit an application for a visa to enter the U.S. It will be far more convenient for most travelers to receive this notification before commencing travel. In addition, accompanied and unaccompanied children, regardless of age, will be required to obtain an independent ESTA authorization and determination of eligibility. VWP travelers who fail to obtain an ESTA travel authorization after ESTA becomes mandatory may be denied boarding, experience delayed processing, or be denied admission at a U.S. port of entry.

About ESTA:

What is the Validity Period?: The validity period for each approved ESTA application will be two years. Therefore, a visitor may travel to the U.S. repeatedly within a two-year period without having to re-apply for another ESTA. Travelers whose ESTA applications are approved, but whose passports will expire in less than two years, will receive an ESTA valid until the passport's expiration date.

Is there a Fee?: Currently, there is no fee associated with ESTA applications. However, DHS has advised that if it is determined at a later time that a fee will be charged, the fee would be implemented through the U.S. government's rulemaking process.

When should an individual apply?: VWP travelers are not required to have specific plans to travel to the U.S. before they apply for an ESTA authorization. DHS recommends that an ESTA approval be obtained as soon as a VWP traveler begins to plan a trip to visit the U.S., and no later than 72 hours before departure to the U.S.. However, ESTA will accommodate last minute and emergency travelers.

What information is required to apply?: To complete the ESTA application, the traveler must provide (in English) biographical data including name, birth date, and passport information, as well as travel information such as the flight number and destination address in the U.S., if known. The traveler will also be required to answer VWP eligibility questions concerning communicable diseases, arrests and convictions for certain crimes, and any past history of visa revocation or deportation.

What if an individual is not approved for ESTA?: If an individual is not approved for ESTA, he/she may reapply for an ESTA after a period of ten days, but unless the circumstances have changed, that same individual will not qualify for an ESTA and will need to apply for a nonimmigrant visa at a U.S. Embassy or Consulate. In addition, reapplying with false information for the purposes of qualifying for an ESTA could make an individual permanently ineligible for travel to the U.S. DHS, in developing the ESTA program, wanted to ensure that only those individuals who are ineligible to travel to the U.S. under the VWP or those whose travel would pose a law enforcement or security risk will be declined an ESTA. While the ESTA Web site will provide a link to the DHS Travel Redress Inquiry Program (TRIP) website, there are no guarantees that a request for redress through DHS TRIP will resolve the VWP ineligibility that caused an applicant's ESTA application to be denied. The U.S. Embassies and Consulates will not be able to provide information about ESTA denials or resolve the issue that caused the ESTA denial. Embassies and Consulates will be able to process an application for a non-immigrant visa, which, if approved, will be the only way that a traveler whose ESTA application has been denied would be authorized to travel to the U.S.

What if an individual already has a valid visa?: Individuals who possess a valid visa will still be able to travel to the U.S. on that visa for the purpose it was issued. Individuals traveling on valid visas will not be required to re-apply, using ESTA.

What if an individual was refused admission to the U.S. in the past?: Travelers who have been refused admission to the U.S. will not be qualified for an ESTA approval and must apply for a visa to travel to the U.S.

DHS believes that ESTA will assist with security concerns and that it will make traveling to the U.S. easier. It is important to note that the information collected by and maintained in ESTA may be used by other components of DHS on a need-to-know basis consistent with the component's mission. Information submitted during an ESTA application may be shared under a memorandum of understanding (MOU) with consular officers of the DOS, to assist consular officers in determining whether a visa should be issued to the applicant after an ESTA application has been denied. Carriers will also receive the information regarding the applicant's ESTA via the Advance Passenger Information System (APIS)/APIS Quick Query system. Information may be shared with appropriate federal, state, local, tribal, and foreign governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order or license, or where DHS believes information would assist enforcement of civil or criminal laws. Furthermore, information may be shared when DHS reasonably believes such use is to aid in anti-terrorism efforts or intelligence gathering related to national or international security or transnational crime. All sharing will remain consistent with the Privacy Act System of Records Notice, which is available on the DHS Web site.

We will keep you apprised of any further developments affecting international travel requirements.

DOL Increases Scrutiny For Certain Perm Applications

On June 2, 2008, the DOL announced it would audit all PERM applications submitted by a single law firm. The rationale for the DOL action was its belief that one or more attorneys at the law firm may have been overly involved in the recruitment process. The purpose of the audits is to determine if any application involved an impermissible level of attorney participation in the recruitment process, sufficient to warrant a determination that the application should be denied or subjected to a DOL supervised recruitment process.

The DOL announcement, and subsequent clarifications, have resulted in much public discussion regarding the proper role of the attorney in advising a client in a legal process. The immigration bar has expressed extreme concern as to the precipitous action of the DOL targeting one firm. As the American Immigration Lawyers Association noted in a letter to the Secretary of Labor, “an intrinsic part of the right to counsel is the right to receive advice on the application of the law to specific facts. DOL cannot change this right to counsel, ingrained through decades of practice in the presence of the same regulatory language, via press release.” The Association also objected to the public naming of the law firm, equating it to trial by press release!

In related news, on July 8, 2008, the DOL placed all pending PERM applications filed by a different law firm under DOL supervised recruitment. This action was taken again because of the DOL’s belief that the law firm was impermissibly involved in their clients’ recruitment processes. It is interesting to note that in this latter finding, the DOL skipped a preliminary audit that might permit the PERM sponsors to introduce evidence that their attorney representatives were not impermissibly involved in the PERM recruitment process.

Finally, also on July 8, 2008, the DOL debarred an immigration software company from filing PERM applications for three years. The DOL determined that the company willfully provided false or inaccurate information when applying for permanent labor certifications, and engaged in a pattern or practice of failing to comply with the terms of the application, ETA Form 9089. It is alleged that labor certifications were filed not for the purpose of obtaining certification for potential employees, but to test the software parameters of the DOL’s PERM program.

We will explore these issues in greater depth in the next edition of our Client Update.

New Rule Proposes Mandatory Use Of E-Verify For Federal Contactors

On June 9, 2008, President Bush issued an Amendment to Executive Order 12989, promulgated in February 1996, that it is the policy of the Executive Branch not to contract with employers that have not complied with the provisions of the Immigration Reform and Control Act (IRCA). The amendment directs all federal departments and agencies to require contractors, as a condition of each future federal contract, to agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment eligibility of all persons hired during the contract term and all persons performing work within the United States on the federal contract. Also on June 9, 2008, DHS Secretary Michael Chertoff designated the agency's E-Verify system, conducted in partnership between the USCIS and Social Security Administration (SSA), as the system of choice.

To implement these actions, a proposed rule was published in the Federal Register on June 17, 2008 by the Civilian Agency Acquisition Council and the Defense Regulations Acquisition Council to amend the Federal Acquisition Regulation (FAR) to require certain contractors and subcontractors to use E-Verify as the means of verifying employment authorization.

David Grunblatt and his team from Proskauer are collaborating with the U.S. Chamber of Commerce and several other law firms in writing comments in response to the proposed FAR regulations. David will provide a detailed update in the next edition of our Client Update.

Ice Worksite Enforcement Update: Largest Immigration Raid In U.S. History

Since 2003, Immigration and Customs Enforcement (ICE) has been expanding its worksite enforcement program against employers and unauthorized workers. In addition to fines, employers are now more vulnerable to worksite raids and investigations, criminal RICO racketeering charges, the potential seizure of assets and profits, and the criminal prosecution of key personnel that could subject them to potential jail time.

In 2007, we saw a new and disturbing trend in enforcement – ICE's increased number of criminal arrests at worksites. ICE reports that last year it made close to 900 criminal arrests of personnel that included corporate officers, managers, human resources employees, and contractors – shattering the myth that the government would not go after the "little guy." ICE is also employing criminal investigative techniques, such as confidential informants and wiretaps, to build federal and criminal cases. Additionally, ICE's immigration investigations demonstrate an unprecedented level of inter-agency cooperation between federal, state, and local authorities.

A good example of the increased sophistication and scope of ICE's enforcement actions is the raid of Agriprocessors Inc.'s meat processing plants in Potsville, Iowa on May 12, 2008. This raid has been hailed by ICE as the largest criminal worksite enforcement operation in U.S. history. Of the 389 undocumented workers initially arrested by ICE, 309 individuals were eventually arrested on criminal charges. The majority of these defendants were sentenced for using false identification to obtain employment, and will, consequently, face five months in prison and deportation following their release. The raid has been hailed by ICE as an enormous success, in particular, because it was an example of ICE's efforts to work alongside a number of agencies including the U.S. Attorney's Office, U.S. Postal Inspection Service, U.S. Department of Labor, local Iowan police departments, U.S. Department of Agriculture, and the Internal Revenue Service.

Experts forecast that in the rest of 2008 ICE will increasingly work with state and local law enforcement agencies to develop and carry out raids targeted at national or large regional employers that demonstrate weak employment verification processes, and those employers who are critical to U.S. infrastructure and security. On June 26, 2008, ICE arrested 32 employees of Aerospace Manufacturing Technologies, Inc., an aircraft manufacturing plant in Arlington, Washington, on administrative immigration violations. We will continue to keep you updated on significant ICE worksite enforcement developments.

Immigration Updates

Department of Homeland Security Announces Customer Service Efforts

On June 6, 2008, DHS announced the launch of three initiatives – the Global Entry pilot program, the Passenger Service Program, and an expanded version of Model Ports Initiative – to try to improve customer service relations at U.S. ports of entry. Approximately one million foreign travelers enter the U.S. daily, and a great many experience long delays, unnecessary scrutiny, anxiety and frustration.

The *Global Entry* pilot program is designed to expedite the screening and processing of pre-approved, low-risk foreign travelers to the U.S. The pilot started on June 6, 2008 at George Bush Intercontinental in Houston, John F. Kennedy International in New York, and Washington Dulles International airports. The Global Entry program requires foreign nationals to volunteer biographic and biometric information, undergo a background check and an interview with a CBP officer. Once admitted, Global Entry travelers can use kiosks at any of the three pilot airports to verify their identity electronically and make any necessary customs declarations. CBP has been accepting applications for the Global Entry program at www.cbp.gov/travel since May 12, 2008.

The new *Passenger Service Program* makes CBP Program Service Managers dedicated points of contact at U.S. ports of entry to help identify and resolve passenger issues. The Passenger Service Program also aims to reduce wait times through the use of clearer, easier to read signs and the implementation of newer technology at CBP's top 20 Model Ports.

DHS is also expanding the *Model Ports Initiative* to 18 additional airports. Originally established in 2006, the Model Ports Initiative introduced the use of a new video, currently available in Spanish, French, German and English, designed to assist travelers through the customs and immigration process at selected U.S. ports of entry. This initiative also introduced a "Welcome to the U.S." brochure, and implemented various new bi-lingual directional signs. In the coming months, international travelers arriving at Model Ports will see an increased number of video monitors, a welcome message and information on the entry process. International airports in the following cities have been selected: New York (JFK), Miami, Los Angeles, Newark, Chicago (O'Hare), Honolulu, San Francisco, Atlanta, Dallas/Ft. Worth, Orlando, Detroit, Boston, Las Vegas, Sanford (Fla.), Seattle, Philadelphia, San Juan and Ft. Lauderdale. This program was first implemented at George Bush Intercontinental in Houston and Washington Dulles International airports.

In a related effort, CBP now provides wait times online at www.cbp.gov for 16 of the busiest international airports, and pedestrian wait times for 12 land border crossings in Arizona, California, and Texas.

USCIS Revives Premium Processing for Certain Forms I-140

On June 16, 2008, U.S. Citizenship and Immigration Services (USCIS) announced that it will now accept Premium Processing Service requests for Form I-140, Immigrant Petition for Alien Worker, filed on behalf of foreign workers nearing the end of their sixth year in H-1B nonimmigrant status in certain specific circumstances.

USCIS's Premium Processing Service allows certain employment-based petitions to be adjudicated within 15 calendar-days for an additional $1,000 fee. During the 15-day period, USCIS may approve or deny the petition, or issue a notice of intent to deny, a request for evidence, or open an investigation for fraud or misrepresentation. In 2006, USCIS designated certain I-140 classifications eligible for its Premium Processing Service; but premium processing for all I-140 petitions was suspended in June 2007.

At this time, USCIS is re-introducing the use of the Premium Processing Service for select I-140 petitions. To be eligible for the Premium Processing Service, the following criteria must be satisfied:

- The foreign national must currently be in H-1B nonimmigrant status;
- His/her sixth year in H-1B nonimmigrant status must be ending within 60 days of the filing of the I-140 petition;
- He/she is only eligible for a further extension of H-1B nonimmigrant status under section 104(c) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21); and
- He/she must be ineligible to extend his/her H-1B status under section 106(a) of AC21.

Section 104(c) of AC21 allows a foreign worker to extend his/her H-1B nonimmigrant status in increments of up to three years, if he/she is the beneficiary of an approved I-140 petition and an immigrant visa is not immediately available. Section 106(a) of AC21 allows a foreign worker to extend H-1B nonimmigrant status in increments of up to one year, if an I-140 petition or underlying labor certification has been pending on his/her behalf for at least 365 days.

This rule permits only a very limited number of petitioners eligibility to request premium processing of Form I-140. It aims to help those beneficiaries who would be forced to leave the U.S. because of the expiration. Discussions continue with USCIS for an expansion of the Premium Processing service.

USCIS Extends Validity Period of Certain EADs

On June 9, 2008, DHS Secretary Chertoff and Commerce Secretary Gutierrez gave an address on the "State of Immigration." They announced that USCIS will begin issuing extended validity, two year Employment Authorization Documents (EADs) to certain foreign nationals whose adjustment of status applications are currently pending.

Under current policy, adjustment of status applicants are issued EADs in one year increments. Starting June 30, 2008, USCIS commenced issuing two year EADs to adjustment of status applicants if their applications are expected to be pending for more than a year because an immigrant visa number is not currently available. USCIS will continue to grant one year EADs for all other adjustment applicants.

Thus, an applicant will only be eligible for a two year EAD if his/her immigrant visa availability date retrogresses, which typically happens when the demand for visa numbers exceeds the predicted supply, after Form I-485, Application of Adjustment of Status is filed. USCIS will determine whether a one or two year EAD is to be issued based on the most recent DOS Visa Bulletin, available at http://travel.state.gov/. If a foreign worker's visa number has retrogressed and a green card is unavailable, USCIS may issue a renewal EAD valid for two years. In a follow up clarification, USCIS stated that two year EADs may only be granted where an underlying I-140 petition has already been approved for the adjustment of status applicant.

This provides some relief to adjustment applicants currently working in the U.S. who until now were required renew their employment documents every year in order to remain eligible for employment.

USCIS Releases New Form I-9

On June 16, 2008, USCIS released a new edition of Form I-9 and mandated its immediate use without any prior warning. However, at the end of June, USCIS revised the Form I-9 page on its website to indicate that it will accept the "Rev. 6 /5 /07" edition of the form, as well as the 6/16/08 edition. The latest version of Form I-9 can be downloaded from USCIS's website at www.uscis.gov.

Although we have provided detailed information concerning the recent changes to Form I-9 in previous newsletters, please be reminded that the following modifications were recently made to the Form I-9 prompting USCIS to revise its form:

1. Five documents have been removed from List A of the List of Acceptable Documents:

- Certificate of U.S. Citizenship (Form N-560 or N-561)
- Certificate of Naturalization (Form N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (Form I-327)Unexpired Refugee Travel Document (Form I-571)

2. One document was added to List A of the List of Acceptable Documents:

- Unexpired Employment Authorization Document (I-766)

3. All Employment Authorization Documents with photographs have been consolidated as one item on List A:

- I-688, I-688A, I-688B, I-766

4. Instructions regarding Section 1 of the Form I-9 now state that the employee is not required to provide his/her Social Security number in Section 1 of the Form I-9, unless he/she is employed by an employer who participates in E-Verify. Furthermore, employers may now sign and retain Forms I-9 electronically.

USCIS Announces New Special Immigrant Visa For Certain Iraqi Nationals

On July 9, 2008, USCIS announced guidelines for a new special immigrant visa for certain Iraqi nationals who worked for, or were contractors of, the U.S. government in Iraq for at least one year after March 20, 2003. Section 1244 of the Defense Authorization Act for Fiscal Year 2008 authorizes 5,000 special immigrant visas for Iraqi employees and contractors each year for fiscal years (FY) 2008 through 2012, as well as their spouses and children. There are no filing or biometric fees associated with this petition.

If the numerical limitation is not reached during a given fiscal year, the unused numbers will roll-over into the 5,000 authorized for the following fiscal year. If the numerical limitation for FY 2012 is not reached, any unused numbers from that year may be used in FY 2013. Numbers will not carry forward into FY 2014.

This new program is not the same as the Section 1059 special immigrant visa program for Afghan and Iraqi translators. However, eligible translators who file or who have filed under that program before October 1, 2008, and who are unable to adjust status or receive an immigrant visa because we have reached the current year's cap of 500, will automatically become eligible to receive a visa number under the new Section 1244 program. Those translators do not need to provide any additional documents or meet any other eligibility requirements under the new program, as long as they meet the requirements under the Section 1059 translator program. However, individuals who file under Section 1059 after September 30, 2008 will be subject to an annual cap of 50 for FY 2009.

A complete description of the new special immigrant visa program to include eligibility and filing requirements is available on the USCIS web site at http://www.uscis.gov.

August Visa Bulletin Shows Progression In EB2; EB3 Categories Unavailable

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 multi-part green card process was received by the government office, determines an individual's place in line for an immigrant visa. Each month, the 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, she 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 August 2008, shows availability in most categories, although the most notable feature of this month's bulletin is the fact that Employment-Based third preference (EB3) visas continues to be unavailable for nationals of all countries, for the unskilled worker category as well as the professionals and skilled workers, and are likely to remain so for the remainder of the fiscal year (through September 30, 2008).

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 strong progression of more than two years, with immigrant visas available for applicants with a priority date of June 1, 2006 or earlier. For applicants born in any other country, immigrant visa availability in the EB2 category remains current.

Departments Of State And Homeland Security Announce "Passport Card"

On July 22, 2008, the DOS and DHS jointly announced that the new U.S. Passport Card is in full production and is being distributed. The wallet-sized document can be used for land and sea travel between the U.S. and Mexico, Canada, the Caribbean, and Bermuda. It is not valid for international travel by air. The passport card is expected to facilitate the frequent travel of Americans living in border communities by utilizing a vicinity-read radio frequency identification (RFID) chip. With this technology, CBP officers will be able to access photographs and other biographical information stored in secure government databases before the traveler reaches the inspection booth so that inspection can be facilitated. For privacy protection, no personal information is stored on the electronic chip itself. The chip will have only a unique number pointing to a stored record contained in secure government databases.

Executives Of McDonald's Franchise Plead Guilty To Immigration Offenses

On July 16, 2008, ICE announced that one current and one former top executive for a franchisee that owns 11 McDonald's restaurants in and around Reno, Nevada, and the corporation itself, pleaded guilty in federal court in Las Vegas to federal felony immigration offenses for encouraging illegal aliens to reside in the U.S. These charges stem from an investigation by ICE into allegations the company knowingly hired illegal alien workers.

USCIS Announces Changes To Vaccination Requirements For Adjustment Applicants

A July 24, 2008 USCIS Update announces changes to the vaccination requirements for adjustment of status applications. These changes include a revised list of vaccines required for applicants seeking to adjust status to become legal permanent residents. This revision follows guidance from the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC). CDC's revised *Technical Instructions to Civil Surgeons for Vaccination Requirements* require the following age-appropriate additional vaccinations to adjust status to legal permanent resident:

- Rotavirus
- Hepatitis A
- Meningococcal
- Human papillomavirus
- Zoster

The requirements for these new vaccines went into effect on July 1, 2008, however CDC approved a 30-day grace period for any medical exam conducted before August 1, 2008. At that time the new vaccinations, if appropriate, must be administered in order for USCIS to approve the applicant for adjustment of status. USCIS has revised the Report of Medical Examination and Vaccination Record *(*Form I-693) to include these new vaccination requirements. The June 5, 2008 edition of Form I-693 must be used for any medical examination completed on or after August 1, 2008.