Proskauer

# Immigration & Nationality Law Update

**May 2008**

## H-1B Cap Reached for 2009 With Record Number of Petitions Received; Certain F-1 Students Given Additional Immigration Benefits

As we have previously reported, on April 14, 2008, United States Citizenship and Immigration Services (USCIS) conducted an electronic lottery to select the lucky H-1B winners from among the approximately 163,000 petitions received between April 1 and April 7. Since the total number of cap-subject petitions received during this period included a sufficient number of filings to grant all available 2009 H-1Bs, USCIS ran two random selections: first for the 20,000 allocation available for individuals with advanced degrees from American universities, and second for the designated 58,200 slots for all other cap-subject cases, together with holders of U.S. advanced degrees who were not selected as part of the 20,000 allocation.

The agency said it would, by June 2nd, notify employers whose petitions were selected in the lottery, and that the total adjudication process is expected to take eight to ten weeks. For cases that were selected through the random lottery and filed with a request for premium processing, the 15 day premium processing period began on April 14, the day of the random selection process. A wait list of unselected petitions was also created in case some of the selected petitions are denied or withdrawn.

### Immigration Benefits for Certain F-1 Students Introduced

Practice and USCIS statistics shows that many new H-1B beneficiaries are nonimmigrant students in the U.S., holding valid F-1 student status. Because of the speed with which *last* year's H-1B cap was met (April 1, 2007 for the regular allocation, and April 30, 2007, for the U.S. advanced degree allocation), a considerable number of petitions received this year were for students whose petitions were rejected or were not filed last year. This domino effect means that, even if the H-1B petition was selected this year, many lawful students now have expired or expiring optional practical training (OPT) work authorization. In addition, to an even greater extent than last year, we are faced with a significant number of petitions that will not be selected, based on the sheer volume of petitions submitted. The problem will only continue to grow more dire, unless and until Congress acts to fix the H-1B program.

In the meantime, there have been a few measures taken by USCIS to ease the sting of the H-1B cap crisis for valid F-1 students. On April 4th, USCIS announced it would extend the optional practical training (OPT) work authorization for some nonimmigrant students who have completed their degree programs. The rule, published in the *Federal Register* on April 8th, contains two provisions to extend the period of Optional Practical Training (OPT) for certain F-1 students. The rule will also implement other changes, including authorization for students to apply for OPT within 60 days after graduation; the current rule requires that the OPT application be submitted within the 90 days prior to graduation only.

Students With STEM Degrees

The first provision extends the OPT from 12 to 29 months for qualified F-1 non-immigrant students. The extension will be available to an F-1 student with a degree in science, technology, engineering, or mathematics (STEM degrees) who is employed, pursuant to OPT based on the STEM degree, in a position related to the STEM degree, by a business enrolled in the E-Verify program. This is a major innovation, that will relieve some of the intense pressure to file an H-1B petition for a student worker as early as possible. As the rule recognizes, a 29 month OPT period might give an employer up to three tries to file an H-1B petition while the student is in valid – and work authorized – status.

A list of currently recognized STEM fields may be found on the website of the Bureau of Immigration and Customs Enforcement (ICE) at http://www.ice.gov/sevis/stemlist.htm. New guidelines have been published to provide instructions to students, authorized school representatives, and employers on how to implement the extension of work authorization, and an affected student may obtain a new Employment Authorization Document (EAD). The rule also imposes a new burden on an employer, requiring that it notify the student's school within 48 hours of her termination of eligible employment.

One major remaining question is that of E-Verify enrollment: this is a particularly pressing issue for an employer that is not currently participating in E-Verify. E-Verify is a program conducted by USCIS in partnership with the Social Security Administration (SSA) that allows an employer to check the employment authorization and social security number (SSN) of newly hired employees as an extension of the employment eligibility verification process. Several state laws include the obligation for an employer to enroll in E-Verify, and the federal government increasingly encourages participation in the program. See our March Newsletter for a more comprehensive explanation of the E-Verify program.

In general, E-Verify allows an enrolled employer to select the work location(s) at which it will implement the program; at any participating location, the employer must utilize E-Verify for each new hire, beginning at the time of enrollment. In a "Supplemental Question and Answer" bulletin posted on the USCIS website on May 23rd, USCIS confirms that, for a student who seeks an OPT extension under the STEM rule, the employer must be an E-Verify participant *at the location where the F-1 student will be employed*.

For an employer not currently enrolled in E-Verify, or one enrolled in a limited number of locations, an evaluation of the pros and cons of participation in the program at all, or on a broader basis, must be considered, since the implications extend far beyond simply extending work authorization for a possible few employees. The rules specifically state that an enrolled employer must be in "good standing" – that is, fully compliant with the program once enrolled – and cannot enroll in name only, just to support the OPT extension of a student worker.

Cap-Gap Coverage

Another aspect of the rule responds to the situation in which an F-1 student's status and work authorization expire before he or she can begin employment under the H-1B visa program. In the past, a student would often find herself with OPT expiring in, say, June. USCIS regulations allowed the student to lawfully remain in the U.S. for an additional 60 day "grace period," after which the student would need to leave the U.S., and would be unable to return until she could obtain her H-1B visa and begin working on October 1st.

The interim final rule addresses this problem by automatically extending the period of stay and work authorization for an F-1 student with a pending or approved H-1B petition. The extension of employment authorization and/or F-1 status will terminate automatically if the H-1B petition is rejected, denied or revoked. The extension of work authorization is made by the student's Designated School Official (DSO), and is proven by issuance of an updated Form I-20, which notes the extension. No new EAD card is authorized or required.

Because the new measure was issued after the H-1B filing period, most petitions for eligible students did not request a "change of nonimmigrant status" from F-1 student to H-1B status, since those students could not show that they would have lawful status on September 30th. The change of status is necessary for the student to be able to remain in the U.S. and continue with her lawful stay and, where applicable, work authorization, until October 1, 2008, under this cap-gap authorization. The rule made accommodations for employers to alter the action requested on selected petitions this year, as long as the request is made within 30 days of the H-1B petition approval.

**Travel Restrictions for F-1 Students**

With the summer months ahead, many students have travel on their minds. Foreign students often plan to travel internationally before beginning or continuing work. A student taking advantage of the cap-gap rule will have a tough decision to make, though. In its May 23rd supplemental Questions and Answers, USCIS clarified that a valid EAD card, in addition to other documents showing admissibility, is required for admission to the U.S. in F-1 status during a period of post-completion OPT. Since a student working pursuant to the cap-gap rule by definition does not have a valid EAD card, she will not be permitted to reenter in F-1 status and resume employment under this rule. She must instead wait abroad until she may apply for an H-1B visa and enter to begin work on October 1st.

We will keep you apprised of any updates on this developing story.

**CBP Announces Expedited Clearance Pilot Program for Low-Risk Travelers**

U.S. Customs and Border Protection (CBP) began processing applications on June 6, 2008 for the Global Entry Pilot program, referred to as the International Registered Traveler (IRT) program, designed to expedite the screening and processing of low-risk, frequent international travelers entering the U.S.  CBP will be evaluating the IRT program during this pilot, with the ultimate goal to implement a single, integrated passenger processing system that will expedite the movement of low-risk, frequent international air travelers by providing an expedited inspections process for pre-approved, pre-screened so-called “trusted” travelers.

IRT will be available for U.S. citizens or lawful permanent residents who are frequent international travelers, provided they have not been found guilty of a criminal offense, charged with a customs or immigration offense, or declared inadmissible to the U.S. under immigration regulations. Biometric fingerprint technology will be used to verify the passenger’s identity and confirm his status as a Global Entry participant.  By implementing this initiative, CBP hopes to facilitate the movement of people more efficiently. The program will kick off June 10, 2008 at the three initial airports: John F. Kennedy International Airport in New York, George Bush Intercontinental Airport, Houston, and Washington Dulles International Airport.

**State Immigration Law Update**

**Mississippi**

On March 17, the Governor of Mississippi passed the “Mississippi Employment Protection Act,” one of the nation’s broadest state immigration laws, which creates serious employer responsibilities and penalties for hiring unauthorized workers.

Mississippi's new law requires *all* employers to participate in E-Verify, the federal government's employment verification program, formerly known as the "Basic Pilot Program." While the law is effective as of July 1, 2008, the E-Verify requirement will be rolled out in stages over three years: By ***July 1, 2008***, Mississippi's public employers, public contractors, and private employers with 250 or more employees must begin using E-Verify. By ***July 1, 2009***, employers with 100 or more employees must begin using E-Verify. By ***July 1, 2010***, employers with 30 or more employees must begin using E-Verify, and by ***July 1, 2011***, all Mississippi employers must be participating in E-Verify.

The Mississippi law also has a provision that creates a new private cause of action for discrimination. Under the law, an employer can be found to have committed a "discriminatory practice" if it fires a U.S. Citizen or Legal Permanent Resident while retaining an employee who the employer knows, or reasonably should have known, is an unauthorized employee, and who is working in a similar job as the discharged employee. An employer that participates in E-Verify is protected from liability and investigation under this provision. This "discriminatory" cause of action provision has become a recurring new feature of recently passed state immigration laws. Oklahoma and Utah also have adopted similar provisions.

An employer that violates the Mississippi law can lose its business licenses and/or permits for up to one year. It will also be subject to the cancellation of state/public contracts, and may become ineligible for new state/public contracts for up to three years. Under the new law, contractors or employers will be liable for any additional costs incurred because of the cancellation of contracts or the loss of their business licenses or permits.

One of the most serious and controversial provisions is that the law makes it a felony for an individual to accept or perform employment knowing, or recklessly disregarding, that s/he is unauthorized to work. Under the law, it remains a felony for an undocumented worker to have a job. Upon conviction, violators can face one to five years in prison, and $1,000 to $10,000 in fines.

**Utah**

On March 13, Utah passed an immigration bill that requires its public employers and public contractors to participate in a "status verification system" by July 1, 2009 to verify the work authorization of its employees. The law does not limit employers to the E-Verify program, but instead allows for a number of alternatives. An employer may participate in any other similar federal program designated by the Department of Homeland Security (DHS); utilize an independent, third-party system with an equal or higher degree of reliability than E-Verify; or use the Social Security Number Verification Service to check workers' employment authorization.

In addition, under the new Utah law, it is unlawful for any employer to discharge a U.S. Citizen or Legal Permanent Resident, and replace the fired employee with an individual who the employing entity knows, or reasonably should have known, is an unauthorized worker. An employer participating in a status verification system is protected from liability and investigation under this provision.

**Arizona**

On May 1, the Arizona governor signed into law an immigration bill (HB 2745) that would amend the Legal Arizona Workers Act (LAWA), the law that requires all Arizona employers to use E-Verify as of January 1, 2008. LAWA, signed by Arizona's governor in July 2007, provides business license penalties for employers that knowingly or intentionally hire undocumented workers, and requires all employers to participate in the E-Verify program. (Our September 2007 issue of the Immigration and Nationality Law Update includes a full description of LAWA).

The new Arizona law clarifies, revises, and adds provisions to LAWA. Some key provisions include:

- LAWA affects employers who hire employees after December 31, 2007. Thus, an employer will not face business license penalties for the employment of unauthorized workers hired before January 1, 2008.
- Upon a second violation, an employer will lose all licenses at the specific location where the unauthorized worker was employed. However, if the employer did not hold a license specific to that location, the state would permanently revoke all licenses that are held at the employer's primary place of business.
- Employers that apply for a state grant, loan, or any other economic development incentive will be required to provide proof of their participation in the E-Verify

program.

- The law defines independent contractors, and clarifies that independent contractors are employers under LAWA.
- Any state government agency will have the right to inspect the records of its contractors and subcontractors to ensure that the contractors/subcontractors are complying with federal work authorization laws.
- Arizona employers can now also be found to have “knowingly” or “intentionally” employed an unauthorized worker if the employer uses contracted labor with knowledge that the contractor employs or contracts with an individual who is unauthorized to work.

**Illinois**

In August 2007, citing civil rights concerns, Illinois passed the first state law (HB 1744) that ***prohibits*** employers from using the federal E-Verify program. In response, the federal government filed a lawsuit against the State of Illinois. In late April, the federal government and the State of Illinois came to an agreement to delay the implementation of the law until June 15, 2008 while the State legislature reviews a new bill that would amend the existing Illinois law. Currently, the state law (HB 1744) provides that employers are prohibited from enrolling in any Employment Eligibility Verification System, including the federal E-Verify program, until the Social Security Administration and DHS databases are improved to sufficiently increase the reliability of the system. In addition, Illinois state law (HB 1743) provides that it is a civil rights violation for any employer, any agent of any employer, any employment agency, or any other entity to use the E-Verify program to check the employment authorization of an individual.

**USCIS Proposes New Rule to Extend TN Admission to Three Years**

On May 9, 2008, USCIS published a proposed rule in the *Federal Register* that would extend the period of admission of TN professionals to three years. Currently, a Canadian or Mexican citizen who is granted TN classification under the North American Free Trade Agreement (NAFTA) is admitted for a maximum period of one year, and is required to re-apply for extensions on an annual basis. Under the new rule, admission and extensions may be granted for periods of up to three years at a time, and dependents would also benefit from the three-year period of initial admission or extension. The new rule is meant to ease the administrative burdens and costs on TN nonimmigrants, and help employers. USCIS is accepting comments on the rule through June 9, 2008. The rule will become effective once it is published in the *Federal Register*.

**June 2008 Visa Bulletin**

The Visa Bulletin for the month of June 2008 shows some good news – with availability in all categories, continuing progression in the EB2 categories, but with no progression in the EB3 category. The first employment-based preference category (EB1) remains current for all nationalities. Notably, the second preference category (EB2) for India and Chinese-born applicants continues to have availability, with immigrant visas available for applicants with a priority date of April 1, 2004 or earlier. For applicants born in any other country, immigrant visa availability is current for the EB2 category.

The June 2008 Visa Bulletin shows no progression in the backlogs for the third employment-based preference category (EB3). The priority dates for all nationalities in the EB3 category remain unchanged from last month: EB3 Indian applicants: November 1, 2001; EB3 Chinese applicants: March 22, 2003; EB3 Mexican applicants: July 1, 2002; and EB3 Philippine applicants and applicants from all other countries: March 1, 2006. The Department of State advises that that EB3 annual numerical limits are likely to be reached in June, thus we expect the EB3 category may experience retrogressions or visa unavailability in July.

For those unfamiliar with the Visa Bulletin, by way of background, there are specific quotas for the number of 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.