Proskauer

Immigration & Nationality Law Update

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Filing Deadline for 2009 H-1B Petitions Approaches; Updates in USCIS Procedures

As we've previously reported, the annual filing deadline for new H-1B petitions, to take effect October 1, 2008, arrives on April 1st. In a last minute flurry of procedural housekeeping, USCIS published an interim rule in the Federal Register on March 24, 2008 that details several changes.

As background, the immigration law includes a limitation of 65,000 on the number of new H-1B petitions that may be granted each year. This number is reduced by a small margin for allocation under the U.S.-Singapore and U.S.-Chile Free Trade Agreements. An additional pool of 20,000 H-1Bs are available for beneficiaries who have earned an advanced degree from a U.S. institution. Exemptions to these numerical limitations exist for certain types of employers/employment situations. Please see our prior client updates for a more exhaustive explanation of the myriad rules of the H-1B category.

Immigration regulations provide for a random selection process when the USCIS receives a sufficient number of H-1B petitions to satisfy each of the regular and U.S. advanced degree allocations. Prior rules mandated that, if the allocation was reached on the first day of filing, the lottery would include all petitions received on the first day, plus any petitions received on the following business day.

As you may recall, the 2008 allocation of regular H-1B petitions was exhausted on the first day of filing, April 2, 2007; and the U.S. advanced degree on April 30, 2007. Following each event, USCIS generated the random selection "lottery" for cases received on, respectively, April 2nd and April 3rd, and April 30th, to identify the H-1B petitions that were adjudicated under each allocation.

The purpose of the March 24th rule is to promote equal opportunity for prospective H-1B petitioners, and amends the H-1B regulations in four key ways:

- When a random selection lottery is needed, the process will include petitions that are filed during the first five business days available for filing the H-1B petitions for a given fiscal year. For fiscal year 2009, presuming that, at the very least, the regular cap will be met on the first day of filing (April 1, 2008), the selection process will include all cases received April 1st, 2nd, 3rd, 4th and 7th. USCIS states that it will seek to allocate the 20,000 H-1Bs available for graduates of U.S. advanced degree programs first, and if any advanced degree cases are remaining after the 20,000 allocation, those cases will become part of the lottery for the regular allocation.
- A petitioner may not file multiple petitions for the same H-1B worker.
- There will be no refund of filing fees for duplicative or multiple H-1B petitions. USCIS will continue to return the filing fees of cases not selected during any lottery.

If the petition incorrectly indicates it is exempt from any of the H-1B numerical limits, the petition will be denied if no H-1B visa numbers are available, and the filing fees will not be returned.

Of particular note is how the limitation on multiple petitions might impact a beneficiary who is the subject of a regular cap case, but completes a U.S. advanced degree program after April 1st but before the special advanced degree allocation is exhausted. In the past, many employers would file a second petition under the U.S. advanced degree allocation, as soon as the beneficiary completed his program. The new rule would preclude an employer for doing so in most circumstances. However, it is our understanding that, as long as the random selection lottery for the regular H-1B allocation is already completed, and availability remains in the U.S. advanced degree pool, a second petition would not be considered duplicative.

We will keep you apprised of all developments on the H-1B program as they progress.

An Introduction to E-Verify

In this article, we provide information on the United States Citizenship and Immigration Services' (USCIS) E-Verify program. The Immigration and Reform Control Act of 1986 (IRCA) obligated employers to verify the identity and the employment eligibility of new employees. For the majority of the past 22 years, the obligation has been satisfied solely by an individual review of original documents, presented by the new employee to the employer's representative – usually a member of the Human Resources staff. This review requires that the staff member be familiar with all of the different documents that might show work authorization, a challenging task for even the most experienced H.R. staff. E-Verify is a system by which an employer obtains verification of the new employee's employment authorization directly from the USCIS, after the individual review is completed, and thereby providing assurance to the employer that the new employee's work permission is valid.

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which required the Social Security Administration (SSA) and Immigration and Naturalization Service (INS), now USCIS, to develop pilot employment verification programs, under the theory that if USCIS is the agency that grants work authorization in most circumstances, they are the appropriate agency to affirm employment eligibility. Thereafter, two programs were implemented: the Systematic Alien Verification for Entitlements (SAVE) program for government benefits, and the Employment Eligibility Verification/Basic Pilot Program, recently renamed "E-Verify," for all other uses. E-Verify is an Internet-based system managed by the USCIS in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility and Social Security Number (SSN) validity of their newly hired employees. Once enrolled, employers may elect to utilize the system across the organization, or may designate it's use only for certain geographical areas (by state, for example), or by company, division, or group.

According to the USCIS, as of February 2008, over 52,000 employers have voluntarily enrolled in E-Verify. The program has been growing by approximately 1,000 new employers each week since October 2007.

The objective of E-Verify is to virtually eliminate Social Security mismatch letters, improve the accuracy of wage and tax reporting, protect jobs for authorized U.S. workers, and help U.S. employers keep a legal workforce. This is accomplished through an automated link to federal databases to assist employers in determining employment eligibility of new hires and the validity of their Social Security numbers. Currently, E-Verify is free and, in most cases, voluntary. It is available in all 50 states. Use of E-Verify is mandatory for all Arizona employers under a state law that took effect January 1, 2008. The new law, the Legal Arizona Workers Act, makes it illegal to knowingly or intentionally hire an illegal immigrant, and includes sanctions such as business license revocation. In March, the Governors of Mississippi and Utah signed off on provisions that will also mandate the use of E-Verify in those states.

Moreover, E-Verify's new Photo Screening Tool is the commencement of biometric verification within the E-Verify structure. This added feature will be the first step in giving employers the tools they require to recognize identity theft in the employment eligibility procedure. The Photo Screening Tool feature permits an employer to check the photo on its new employee’s Employment Authorization Document (EAD) or Permanent Resident Card (“Green Card”) against the 14.8 million images stored in USCIS’s immigration databases.

Opponents of E-verify argue that inaccurate and outdated federal databases can deprive workers of their livelihood; that employers might misuse the program to discriminate against workers; that worker privacy could be compromised because DHS databases do not comply with government and industry-based standards for protecting information; and that the current technological infrastructure cannot support mandatory participation by U.S. employers. In addition, a study by the SSA Inspector General revealed an error rate of 4.1 percent in the data used to administer E-Verify. At that rate, one in every 25 new legitimate hires would receive a “tentative nonconfirmation“ of eligibility, requiring the individual to go through a burdensome process to seek permission to work from the SSA and DHS.

As a participant in E-Verify, an employer is required to verify all newly hired employees, both U.S. citizens and non-citizens. The program may not be used to prescreen applicants for employment, go back and check employees hired before the company signed on to E-Verify, or re-verify employees who have provisional work authorization. Employees must be verified after there is an offer of employment and within three business days of the employee's start date.

After hiring a new employee and completing the Employment Eligibility Verification form (Form I-9), mandatory for all new hires (regardless of E-Verify participation), the employer or agent must submit a query that includes information from sections 1 and 2 of the Form I-9, including: Employee's name and date of birth, Social Security Number (SSN), Citizenship status he or she attests to, Alien number or I-94 admission number, if applicable, Type of document provided on the Form I-9 to establish work authorization status, and Proof of identity, and its expiration date, if applicable. The E-Verify system uses this information to determine if the individual is eligible to work in the U.S. According to a February 13, 2008 New York Times article, "about 93% of the employees checked in the program receive authorization in a matter of seconds."

An employer who verifies work authorization under E-Verify has established a rebuttable presumption that it has not knowingly hired an unauthorized alien. Note that participation in the program does not offer "safe harbor" from worksite enforcement. Employees who do not yet have a SSN may not cannot have their authorization confirmed by E-Verify. A participating employer with such an employee should complete the Form I-9 process with him/her and wait to run the E-Verify query on that individual until it has received his/her SSN. The employer should note on Form I-9 why it did not run an E-Verify query at the time of hire. In the mean time, the employer will have completed the Form I-9 Employment Eligibility process for the employee and verified his/her work authorization in a timely fashion, and the employee is permitted to work temporarily without a SSN.

In the event that the information the employee provided on Form I-9 does not match the records held by the SSA or DHS, the employer must promptly give the employee a "Tentative Non-confirmation Notice," which advises the employee about what did not match and how to contest it. If the employee decides to contest the mismatch, the employer must provide him/her with a referral letter from the E-Verify System that includes specific instructions and contact information. The employee has eight federal government workdays to initiate the process of contesting. During this process, the employer may not fire the employee or retaliate against the employee in any way.

Emilio Gonzalez, the departing USCIS director, said the program is proving to be "a key component in promoting the integrity of the employment verification process of our work force." He adds, "So far this fiscal year, the legal work status of 1.7 million newly-hired employees has been checked using the system."

An employer may register for E-Verify at https://www.vis-dhs.com/EmployerRegistration. At the end of the registration process, an employer is required to sign a Memorandum Of Understanding (MOU) that provides the terms of agreement between the employer, the SSA, and USCIS. The USCIS's E-Verify manual can be found at: http://www.uscis.gov.

While there are still many voices raised against E-Verify, especially those that find the system intrusive or dangerously unreliable, an equal number of employers and organizations find the system valuable for its simplicity. Even more significant, though, is the advancement of the idea that E-Verify is – or will be – required of employers. Although voluntary under federal law, almost certainly more and more state governments will follow the lead of Arizona, and mandate its use, despite challenges to the constitutionality of such state laws on preemption grounds. E-Verify is also frequently required for employers who are the subject of an enforcement action by the DHS's Bureau of Immigration and Customs Enforcement (ICE), and we hear almost daily of another ICE raid somewhere in the U.S. These factors might, at least partially, account for the growing number of participants in the program.

USCIS issues revised instructions for Form I-131, Application for Travel Document

Effective March 5, 2008, U.S. Citizenship and Immigration Services (USCIS) requires applicants for re-entry permits and refugee travel documents who are between the ages 14 and 79 to provide biometric information (e.g., fingerprints and photographs) at a USCIS Application Support Center (ASC). USCIS advises that the biometric information is used to conduct background and security checks, as well as to produce more secure travel and entry documents with individual biometric identifiers. USCIS will notify an applicant of her appointment by sending an ASC scheduling notice after initial submission of the Form I-131 application. We strongly advise applicants to apply as early as possible – at least 90 days in advance of international travel - to allow for ample time to attend an ASC appointment and to receive the travel documents.

Although the revised instructions allow some individuals to file Form I-131 while abroad, and visit a U.S. Embassy or consulate for fingerprinting, the vast majority of overseas applicants must still travel to the United States to submit the application for a travel document. Prior to this change, applicants could schedule a short, two business-day trip to the U.S. to submit a re-entry permit application, and satisfy the requirement for physical presence at the time of the application. In addition to imposing the new obligation for biometrics, the new instructions also state that a reentry permit or refugee travel document application may be denied if the applicant leaves the U.S. before attending the biometrics appointment. Applications will be at risk if the applicant leaves the U.S. prior to completing the biometrics, even if she plans to return for the scheduled appointment. Since the scheduling of biometrics appointments in other types of applications may often take up to a few months, applicants may now be delayed in the U.S. far longer than in the past.

If expedited processing is needed, the instructions suggest submitting two pre-paid express mailers with the application. The USCIS will send the applicant her Form I-131 application receipt and ASC appointment notice in one mailer, and the issued Re-entry Permit in the second mailer. Note that a request for expedited processing should contain the applicant’s reasons for the request.

The revised instructions requires applicants pay a new $80 biometrics services fee (in addition to the USCIS filing fee for Form I-131) to cover the costs of the biometrics processing.

Needless to say, we expect this new rule to greatly complicate the process of coordinating applications for re-entry permits and refugee travel documents, especially when the applications are for document renewals.

The CDC Changes Vaccination Requirements for Immigrant Visa Applicants

In order for a foreign national to complete processing of his immigrant visa application at a U.S. Embassy or consulate abroad (the alternative to filing an I-485 Application for Adjustment of Status with USCIS in the U.S.), he must undergo a medical examination by a Department of State authorized panel physician. During the medical exam, the physician verifies that the immigrant visa applicant has obtained all of the necessary vaccinations.

Recently the Centers for Disease Control (CDC) changed it's instructions for panel physicians conducting immigration medical examinations. First, CDC added the following vaccination requirements for all applicants:

- Rotavirus vaccine, hepatitis A vaccine, meningococcal vaccine, human papillomavirus vaccine, and zoster vaccine have been added as age-appropriate to the vaccination requirements.
- Hepatitis B vaccine is required through 18 years of age.
- Influenza vaccine is required for children ages 6-59 months.
- Acellular pertussis-containing vaccines have been developed for persons ages 10-64 years.

Additional details with respect to the technical requirements and administration of immigration vaccination requirements can be found on Department of State's website at http://travel.state.gov.

Second, in order to update the 1991 system currently in place, the CDC is implementing new procedures (initially in only eight countries) aimed at better identifying infectious diseases during immigration medial examinations. For example, tuberculin skin tests (TST) will now be mandated for applicants 15 years of age or younger in countries which the World Health Organization (WHO) has estimated has at least 20 tuberculosis cases for every 100,000 people per year. Additional details regarding procedural, handling, storage and administration changes related to immigrant vaccinations can also be found at http://www.cdc.gov/ncidod/dq/panel_2007.htm.

It’s interesting to note that the CDC has not made similar changes to the instructions for Civil Surgeons who conduct medical examinations of applicants for adjustment of status within the U.S.

Administrative Appeals Office Disagrees with USCIS Nebraska Service Center and finds Indian Master’s Degree Equivalent to U.S. Master’s Degree

Many immigration practitioners believe the USCIS Nebraska Service Center (NSC) has been adjudicating Form I-140 Immigrant Visa Petitions contrary to the regulations. Regulations require determination as to whether a foreign national possesses ”a foreign equivalent degree“ to a comparable U.S. degree. Instead NSC, has been utilizing a strict six year rule (four years of undergraduate studies plus two years of graduate level work) to determine whether a foreign master’s degree is the equivalent of a U.S. master’s degree. Rather than adjudicating cases based on established standards and keeping a list of recognized international institutions of higher education, the NSC typically evaluates degree equivalency on a case-by-case basis, and often requests extensive documentation showing a foreign national’s master’s degree is equivalent to a U.S. master's degree.

Using this arbitrary six year rule, beneficiaries from many countries in Europe, where a five-year combined bachelor’s and master’s degree is common, are often found by NSC to be missing the necessary education. Additionally, foreign nationals from India, who frequently have earned a three-year bachelor’s degree followed by a two-year master’s degree program, with no intermediary one year postgraduate diploma, have also been found lacking under NSC’s 6 year rule, and many of the I-140 petitions filed on their behalf have been denied.

However, on December 5, 2007, the USCIS’s Administrative Appeals Office (AAO) issued an unpublished decision approving an Employment-Based 2nd Preference category (EB2) I-140 petition involving a foreign national who possessed a three-year bachelor’s degree and a two-year master’s degree from India that had been denied by the NSC. The position offered to the beneficiary was computer software engineer, and the education required to perform the job was a master’s degree in ”Information Technology or a related field.” The AAO noted that NSC declined to consider the beneficiary’s Master of Science degree because it followed a three-year bachelor degree. Nevertheless, the AAO stated:

In this matter, however, the petitioner is not relying on a combination of multiple lesser degrees or education and experience to equate to a bachelor's degree. Rather, it is the petitioner's contention that the beneficiary's Master of Science degree . . . constitutes a foreign equivalent degree to a U.S. academic or professional degree above the baccalaureate level. . . The petitioner submits new evaluations and expert opinions all concluding that the beneficiary's Master of Science degree is equivalent to a Master of Science degree in Physics from an accredited U.S. university. . . The petitioner submitted the beneficiary's transcript for his Master's degree, which reflects two years of coursework. This transcript is consistent with the evaluations provided. Moreover, the petitioner has provided consistent and reasonable evaluations all finding that the beneficiary's Master's degree is a foreign equivalent degree to a U.S. Master's degree. Thus, we are persuaded that the beneficiary qualifies for the certified job.

We agree with the AAO's decision because it is consistent with the regulations. If the foreign master's degree, by itself, is proven to be equivalent to a U.S. master's degree, and there is no reliance on the underlying bachelor's degree a combination equivalence, it should be irrelevant whether the foreign national has a three- or four-year underlying bachelor's degree.

In past cases, the NSC and the AAO determined that if the underlying bachelor's degree is not equivalent to a U.S. bachelor's degree, the foreign master's degree will not be considered a U.S. equivalent. Documentation demonstrating the degree equivalency has been a key component in these decisions, and in the instant case, the AAO indicated that the "multiple credible and consistent credential evaluations" were persuasive.

Nevertheless, we warn our clients that this decision does not mean that USCIS and/or the AAO will find acceptable all combinations of three-year bachelor's degrees and two-year master's degree. USCIS and AAO will continue to examine degrees on a case-by-case basis, as is their current practice.

2007 PERM Statistics Released by Department of Labor

In February 2008, the Department of Labor (DOL)'s Office of Foreign Labor Certification released statistical data concerning PERM, its permanent labor certification program. For many foreign national, the PERM process is the first step in the green card process.

Although we have provided detailed information with respect to the PERM process in the past, we take this opportunity to share some interesting statistical information. For example, the DOL approved 85,112 of the 98,753 PERM applications submitted in 2007 and foreign nationals from 176 different nations were the beneficiaries of these PERM applications.

The top four PERM usage states were California, where 20,222 applications were filed, followed by New York, 8,843 applications, New Jersey, 6,594 applications, and Florida 5,128 applications. Foreign nationals from India, China, Mexico, South Korea and Canada were most often the beneficiaries of PERM applications. Information Technology, Advanced Manufacturing, Educational Services, Finance Services and Health Care Services were the most commonly represented business sectors seeking foreign nationals on a permanent basis. The jobs most in demand were Computer Software Engineer, Systems Software Engineer, Computer Systems Analyst, Restaurant Cook, Computer and IS Manager, and Electronics Engineer.

Based on this statistical data it is clear that the U.S. needs to be able to retain highly skilled workers on a permanent basis. We hope the DOL and USCIS will work with employers to ensure their human resources needs are met so that U.S. businesses can focus on their business operations. For more information on PERM statistics please visit DOL's website at http://www.foreignlaborcert.doleta.gov. For assistance with your immigration human resources concerns, please contact our office.

Nonimmigrant Visa Application Delays: PIMS Processing Update

The USCIS and the State Department have advised the immigration bar informally that they have agreed to a process that will hopefully facilitate the entry of petition data into the State Department's PIMS (Petition Information Management Service) system for nonimmigrant petition-based employment visa petitions (H, L, O, P, Q) where an extension of stay, change of status, or petition amendment is requested. Until this point, many nonimmigrant visa applicants are experiencing delays at a U.S. Consulate because of missing information in the PIMS system. We previously reported that U.S. Consular officials are required to obtain PIMS verification before issuing such visas.

The agreement notes that petitions for change or extension of status should include duplicate original petition, with original signatures on all forms. Upon approval of the petition, the USCIS will send the duplicate copy to the State Department's Kentucky Consular Center (KCC) for scanning and entry into the PIMS database.

Notifying USCIS of an Address Change

The immigration laws require all non-U.S. citizens who are in the U.S., and even certain U.S. citizens, to notify the Department of Homeland Security (DHS) of any change of address within 10 days of moving to a new residence. The information required for the change of address notification includes:

- USCIS Receipt Notice showing case receipt number (if there is a pending case with USCIS).
- The new and old address.
- The names and biographical information for sponsored relatives.
- Date of last entry into the U.S. (or an approximate date).
- Place of last entry into the U.S. (whether by land, sea or air).

All non-U.S. citizens, whether permanent residents ("green card" holders) or non-immigrants, are required by law to keep the USCIS apprised of their current address. They may do so by completing USCIS Form AR-11, which may be submitted either my mail, or electronically through the USCIS website. We recommend that copies are retained of all communication with the USCIS (including confirmation pages from the website), and any mail submissions be sent by traceable mail; electronic submission of the Form AR-11 will return a unique confirmation number.

In addition, U.S. citizens or permanent residents who have submitted an Affidavit of Support on USCIS Form I-864 to financially sponsor or co-sponsor an immigrant to the U.S. are also required by law to report a change of address within 30 days of the move, by filing Form I-865. Such Affidavits of Support are required in nearly all family-based green card cases, and in certain employment-based green card cases, when a close relative – spouse, child, parent, or sibling – is the employer, or holds a significant interest of 5% or more in the employer.

In addition to obligations imposed by the law, any person who has an application or petition pending with any office of the USCIS should notify the Service of a change of address. This notification will ensure that all government notices will be directed to the proper address.

The Form AR-11 is not linked to pending applications or petitions, and mere submission of the Form AR-11 will not concurrently update the records for pending applications or petitions. The individual must separately ensure notification for each pending application or petition. For background, when an application or petition is submitted to the USCIS, that office issues a receipt notice, containing a unique receipt number.

Change of address notification for an application or petition may be satisfied by an electronic submission at the USCIS website. After completing the electronic Form AR-11, the USCIS website automatically asks if the individual has any pending petitions or applications. A separate submission is required for each petition and application; each submission receives an individual confirmation number. Again, copies should be kept to maintain proper records.

Individuals may also report a change of address by calling the National Customer Service Center (NSCS) at 1-800-375-5283. However, in our experience, the best method to notify a particular USCIS office of a change of address for a pending application or petition remains the “old fashioned” way – by traceable mail, with a copy of petition or application receipt notice.