Immigration Insider

News from the Alliance of Business Immigration Lawyers
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Headlines:

Details...

1. H-1B Update: Filing Date Approaches; Scrutiny at POEs Increases; USCIS Issues H-1B Guidance Under Economic Stimulus

H-1B filing date approaches. Employers will be able to submit cap-subject H-1B petitions on April 1, 2010, for the fiscal year (FY) 2011 H-1B program. The numerical limitation, or cap, for FY 2010 was reached in December 2009. Beneficiaries of cap-subject petitions may begin employment as early as October 1, 2010. Employers recruiting abroad or who have hired individuals for F-1 "Optional Practical Training" should prepare to have their

petitions delivered to U.S. Citizenship and Immigration Services (USCIS) on April 1, 2010.

Petitions are only subject to the FY 2011 cap if the beneficiary of that petition has not been counted against a cap previously. Thus, "new" H-1B petitions are cap-subject but most petitions for extension, change of employer, or concurrent employment are not affected by the H-1B cap. Further, petitions on behalf of foreign nationals to be employed by institutions of higher education (or related or affiliated nonprofit entities), nonprofit research organizations, or governmental research organizations are not subject to the cap, but if an employer wishes to hire an H-1B employee currently employed at such an organization, the new petition would be cap-subject.

Scrutiny at POEs. Recent reports suggest that scrutiny at ports of entry is increasing for H-1Bs and other employment-based visas, especially those working for information technology consulting firms and those posted at third party worksites. The Alliance of Business Immigration Lawyers (ABIL) recommends that entering nonimmigrants be familiar with the petition filed on their behalf, and that they carry a complete copy of the filing and supporting documents along with up-to-date documentation confirming their employment, such as recent paystubs. Entering H-1Bs should be prepared for the possibility of secondary inspection at the port of entry.

Economic stimulus guidance. Meanwhile, USCIS has issued guidance on the Employ American Workers Act (EAWA) to employers seeking to file H-1B petitions. EAWA was enacted to ensure that companies that receive funding under the Troubled Asset Relief Program (TARP) or the Federal Reserve Act do not displace U.S. workers. Under the legislation, any company that has received covered funding and seeks to hire new H-1B workers is considered an "H-1B dependent employer." An H-1B dependent employer must make additional statements to the Department of Labor (DOL) regarding the recruitment and non-displacement of U.S. workers when filing a labor condition application (LCA).

Subsequent to the enactment of EAWA, USCIS revised its Form I-129, Petition for a Nonimmigrant Worker, to include a question asking whether the employer received covered funding.

USCIS said it understands that some businesses who received covered funding may have repaid their obligations and may not know how to respond to the question (A.1.d on the first page of the H-1B Data Collection and Filing Fee Exemption Supplement). Companies that have repaid their obligations under the law should answer "No" to question A.1.d. Those that

wish to provide further information with the petition to assist USCIS in determining that their status for purposes of EAWA is correct may do so.

USCIS noted that a valid LCA must be on file with DOL when the H-1B petition (with a copy of the LCA) is filed with USCIS. Processing delays or a denial of the H-1B petition may result if the LCA does not correspond with question A.1.d of the H-1B petition, unless any inconsistency is explained to the satisfaction of USCIS. For example, if the LCA includes the additional statements, but question A.1.d is answered "no," the employer can explain that it had received covered funding at the time of filing the LCA but repaid the obligation before filing the I-129. However, if the employer indicates on the petition that it is subject to the EAWA, but the LCA does not contain the proper declarations relating to H-1B dependent employers, USCIS will deny the H-1B petition.

USCIS additionally reminds employers that EAWA applies only to new hires and not to H-1B petitions seeking to change the status of a beneficiary working for the petitioning employer in another work-authorized category. It also does not apply to H-1B petitions seeking an extension of H-1B status for a current employee to continue working for the same employer.

Demand for H-1Bs is expected to increase somewhat this year, so early filing is recommended. Contact your ABIL member for assistance with H-1B petitions.

The EAWA guidance is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=aeda00143ea96210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. For more on H-1B admissions and scrutiny at ports of entry, see http://cyrusmehta.blogspot.com/2010/02/more-on-h-1b-admissions-at-newark.html.

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2. State Dept. Proposes Fee Changes for Consular Services

The Department of State has proposed changes and increases to its schedule of fees for consular services, to take effect "as soon as practicable following the expiration of the 30-day public comment period" and after the Department has considered any public comments received. Written comments must be received within 30 days from February 9, 2010.

Among other things, the proposed rule establishes a tiered application processing fee for immigrant visas depending on the category, instead of the

current $355 fee for all immigrant visas. The application fee for an employment-based visa processed on the basis of an I-140 petition will be $720. Other immigrant visa applications (including for diversity visa applicants, I-360 self-petitioners, special immigrant visa applicants and all others) will have a fee of $305. Certain qualifying Iraqi and Afghan special immigrant visa applicants are statutorily exempt from paying a processing fee. The application fee for a family-based visa processed on the basis of an I-130, I-600, or I-800 petition will be $330. The Department is also increasing the immigrant visa security surcharge from $45 to $74.

Those who apply for immigrant visas on the basis of having been selected by the diversity visa lottery will pay $440 instead of $375, based on an estimated 81,000 applications to be processed in fiscal year 2010.

Also, the proposed rule increases the adult passport application fee from $55 to $70. Certain consular services performed for no fee have been included in the fee schedule "so that members of the public will be aware of significant consular services provided by the Department for which they will not be charged." Nonimmigrant visa fees, including those for machine-readable visas and border crossing cards, were included in a separate rule published on December 14, 2009.

The proposed rule, which was published on February 9, 2010, is available at http://edocket.access.gpo.gov/2010/pdf/2010-2816.pdf.

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3. USCIS To Issue Revised Approval Notices for Certain I-129s and I-539s

U.S. Citizenship and Immigration Services (USCIS) issued an alert about certain Notices of Approval (Forms I-797) issued between January 20 and 27, 2010, with incorrect or missing information. The form types affected are the Petition for a Nonimmigrant Worker (Form I-129) and the Application to Extend/Change Nonimmigrant Status (Form I-539).

USCIS has started mailing new approval notices with corrected information to affected I-129 petitioners and I-539 applicants. Petitioners and applicants who received incomplete or incorrect approval notices should not attempt to use them. USCIS estimates that approximately 500 incorrect I-797s were issued. Examples of errors on the approval notices of affected petitioners and applicants include:

- For the I-129, petitioners who requested multiple unnamed beneficiaries were issued an approval notice that lists only one unnamed beneficiary.
- For the I-539, some applicants were issued an approval notice with no validity dates listed.

Those who know or believe that their Notice of Approval was issued with incorrect or missing information but have not yet received a revised Notice of Approval should contact USCIS at the appropriate e-mail address listed in the USCIS alert, available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=72d059ac05b86210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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4. Labor Dept. Publishes H-2A Final Rule

The Department of Labor's (DOL) Employment and Training Administration and Wage and Hour Division have published a final rule effective March 15, 2010, affecting various aspects of the temporary agricultural employment of H-2A workers.

In response to the proposed rule, the DOL received comments from a broad range of constituencies for the H-2A program, including individual farmers, farm workers, farm associations, farm worker advocate groups, agents, law firms, farm labor bureaus, State Workforce Agencies (SWAs), state government officials, members of Congress and committees, and various interested members of the public. Many of the comments challenged the DOL's decision to engage in new rulemaking for the H-2A program. The DOL responded that it has inherent authority to change its regulations, and has justified doing so in the final rule.

Among other things, in the definition of corresponding employment, the DOL had proposed that all workers employed by H-2A employers doing work performed by H-2A workers be considered engaged in corresponding employment. The final rule adopts the language of the proposed rule. One change from the related 1987 rule is the addition of the phrase "or in any agricultural work performed by the H-2A workers." The DOL said it added this language to address the adverse impact on U.S. workers when an H-2A employer engages H-2A workers in agricultural work outside the scope of work found in the approved job order, including work impermissibly performed outside the area of intended employment. The DOL explained that "[d]omestic workers should not be disadvantaged when an employer violates

the terms and conditions of the H-2A job order." The final rule does not require that every worker on a farm be paid the H-2A required wage. It does require, however, that workers employed by an H-2A employer who perform the same agricultural work as the employer's H-2A workers be paid at least the H-2A required wage for that work.

Also, the rule adds one factor to the circumstances that may be considered in determining whether an employer is a successor in interest. The change, as noted in the proposed rule, clarifies that whether the former management or persons with an ownership interest in the prior firm retain a management interest in the successor firm may be considered in the successor determination.

The final rule also makes various adjustments to the definition of agricultural labor or services. For example, it removes a provision that permitted certain nonagricultural work when no H-2B workers were employed to perform the same work in the same location. Such nonagricultural work may include activities like handling, planting, drying, packing, processing, freezing, grading, storing, or delivering agricultural or horticultural commodities. A commenter had expressed disappointment about the removal of that provision, stating that it was a major change and would adversely affect packing houses that might not be able to obtain H-2B workers due to the annual cap, and noting that H-2B workers often work alongside H-2A workers and their jobs are clearly in the stream of agriculture. The DOL said the provision was problematic because it allowed a farmer to employ both H-2A and H-2B workers to perform identical work, so long as the H-2A workers and H-2B workers were employed in different locations. But Congress clearly intended to create two separate programs, the DOL noted: one for H-2A agricultural work and another for H-2B nonagricultural work.

The final rule further removes references to incidental work from the definition of agricultural labor or services, in an effort to tighten up what kinds of work may be performed. For example, the final rule deletes a provision providing a blanket 20 percent tolerance for work outside the scope of the application. The DOL explained that it does not intend to debar an employer whose H-2A workers perform an insubstantial amount of agricultural work not listed in the application. The DOL said that it may take into account unplanned and uncontrollable events (such as a freeze that prevents planting or heavy rains that prevent harvesting) when considering the employer's explanation, so long as the activities are within the scope of H-2A agriculture, have been occasional or sporadic, and the total time spent is not substantial. Further, the DOL noted, the debarment regulations require that a violation be substantial, and that a number of factors must be considered in making that determination, including an employer's previous

history of violations; the number of workers affected; the gravity of the violation; the employer's explanation, if any; its good faith; and its commitment to future compliance. Under these criteria, the DOL said, the good-faith assignment of a worker to work not listed in the application for a small amount of time would not result in debarment.

The final rule, which also includes a long discussion of wage rates and adds the agreed-upon collectively bargained wage rate to the list of required wage rates, is available at http://edocket.access.gpo.gov/2010/pdf/2010-2731.pdf. A related fact sheet is available at http://www.dol.gov/opa/media/press/eta/eta20100198-fs.htm, and a news release is available at http://www.dol.gov/opa/media/press/eta/eta20100198.htm.

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5. USCIS Issues Guidance on H Nonimmigrants in the CNMI and Guam

U.S. Citizenship and Immigration Services (USCIS) has provided guidance for processing and adjudicating the Petition for a Nonimmigrant Worker (Form I-129) filed on behalf of H-1B specialty occupation and H-2B temporary nonagricultural workers in the Commonwealth of the Northern Mariana Islands (CNMI) and Guam. The memo notes that H-1B and H-2B workers in the CNMI and Guam are exempt from the numerical limitations, or caps, for these categories. To qualify for this exemption under the H-1B classification, the prospective employer's petition must include a labor condition application (LCA) listing employment or services in the CNMI and/or Guam only. To qualify under the H-2B classification, the petition must include a temporary labor certification (TLC) listing labor or services in the CNMI and/or Guam only.

The memo is available at http://www.uscis.gov/USCIS/Laws/Memoranda/2010/February/cnmi-guam-h-cap-exemption.pdf. A related Q&A is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a310bc3c1be96210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

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New Publications and Items of Interest

Undocumented statistics. The Department of Homeland Security's Office of Immigration Statistics has published *Estimates of the Unauthorized*

Immigrant Population Residing in the United States: January 2009. The report provides estimates of the undocumented population residing in the U.S. by periods of entry, leading countries of birth, and states of residence.

The data show that between January 2008 and January 2009, the number of undocumented people living in the U.S. decreased seven percent, from 11.6 million to 10.8 million. Between 2000 and 2007, the unauthorized population grew by 3.3 million, from 8.5 million to 11.8 million. An estimated 8.5 million of the total 10.8 million undocumented persons living in the U.S. in 2009 were from the North America region, including Canada, Mexico, the Caribbean, and Central America. The next leading regions of origin were Asia (980,000) and South America (740,000). Mexico continued to be the leading source of unauthorized immigration to the U.S., with 62 percent of the undocumented population from Mexico. California remained the leading state of residence of the unauthorized population in 2009, with 2.6 million. The next leading state, Texas, had 1.7 million unauthorized residents, followed by Florida with 720,000.

The report is available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

DOS annual report on immigrant visa applicants. The Department of State (DOS) has released its annual report on immigrant visa applicants in the family and employment categories as of November 1, 2009. The figures reflect only petitions the DOS has received and do not include the significant number of applications pending at U.S. Citizenship and Immigration Services, such as applications for adjustment of status. As of November 1, 2009, the DOS's figures show that approximately 3.5 million immigrant visa applicants (and their spouses and children) are on the waiting list in the employment-based categories. That total includes 3,601 in the EB-1 category; 6,295 in EB-2; 119,759 in EB-3 (including 103,448 skilled and 16,311 other workers); 529 in EB-4; and 325 in EB-5. The report also includes listings of the countries with the highest number of waiting list registrants in each category.

The report is available at http://www.immigration.com/sites/default/files/annual_report_Immvisa_applicants.pdf. For the latest information on visa issuances at foreign service posts, see http://www.travel.state.gov/visa/frvi/statistics/statistics_4594.html.

Haiti information. U.S. Citizenship and Immigration Services (USCIS) has posted links to immigration information and resources available from USCIS and the Department of State in response to the Haiti earthquake. Included

are links on temporary protected status, humanitarian parole, and special situations. The page is posted at http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm#1.

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Recent News from ABIL Members

Laura Danielson (bio: http://www.abil.com/lawyers/lawyers-danielson.cfm) and Stephen Yale-Loehr (bio: http://www.abil.com/lawyers/lawyers-loehr.cfm) gave an EB-5 talk on February 4, 2010, at a Minnesota State Bar Association seminar on immigration investment issues.

Steve Garfinkel (bio: http://www.abil.com/lawyers/lawyers-garfinkel.cfm) will present "Immigration law issues affecting Public Schools" to the North Carolina School Law Academy in Hickory, North Carolina, on Thursday, March 18, 2010.

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Government Agency Links

Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

USCIS Service Center processing times online:
https://egov.uscis.gov/cris/processTimesDisplay.do

Department of Labor processing times and information on backlogs:
http://www.foreignlaborcert.doleta.gov/times.cfm

Department of State Visa Bulletin:
http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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The Alliance of Business Immigration Lawyers (ABIL) is an entity that offers a single point of contact for customer needs, news alerts, staff training and other programs that benefit the client through the collaboration of the 140 member attorneys and their 460 staff. Corporate counsel, human resource professionals, in-house immigration managers and other corporate decision-makers turn to ABIL attorneys for outstanding legal skills and services. ABIL's work also includes advocating for enlightened immigration reform, providing speakers and media sources, presenting conferences, publishing books and articles on cutting-edge immigration topics, and sharing best

practices, all with the ultimate goal of offering value-added services to business immigration clients.

The Alliance of Business Immigration Lawyers' Web site is: http://www.abil.com/.

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