News from the Alliance of Business Immigration Lawyers
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Headlines:

- **1. WHD Plans Nationwide Audit of Independent Contractor Misclassifications** - Targeted industries may include may include agriculture, construction, distribution, food processing, hospitality, janitorial services, landscaping, manufacturing, restaurants, and sanitation.

- **2. District Court Finds NY Education Law Limiting Pharmacist Licenses to U.S. Citizens, LPRs Unconstitutional** - A New York education law was found unconstitutional because it violated the plaintiffs' rights under the Equal Protection Clause of the U.S. Constitution and encroached on federal immigration authority.

- **3. USCIS Designates Two AAO Decisions As Binding Precedent** - The first decision holds that an employment-based petition must be "valid" initially if it is to "remain valid with respect to a new job," and the second clarifies the definition of employment by an "American firm or corporation."

- **4. State Dept. Seeks OMB Approval, Comments on Exchange Visitor Program Annual Reports** - Annual reports will be submitted to DOS electronically "as soon as the mechanism for doing so is approved and in place."

- **5. USCIS Opens New Office in Holtsville, Long Island** - The full-service office has the capacity to serve approximately 400 residents of Nassau, Suffolk, and Queens Counties per day, including fingerprinting.

- **6. ABIL Global: India Changes Work-Related Visa Rules** - In an effort to protect India's non-technical workers and attract highly skilled foreign workers, the Indian Ministry of Home Affairs has issued an order and released a new FAQ.

- **7. ABIL Global: Canadian Regulatory Changes Will Affect Canadian Employers, Temporary Foreign Workers** - Various changes to Canada's Immigration and Refugee Protection Regulations will take effect on April 1, 2011, affecting both Canadian employers and their temporary foreign workers.

Also in this issue:

Details...

1. WHD Plans Nationwide Audit of Independent Contractor Misclassifications

The Department of Labor's Wage and Hour Division (WHD) reportedly plans a nationwide audit this fall of misclassifications of employees as independent contractors, and U.S. Immigration and Customs Enforcement sent notices of inspection to employers nationwide in September 2010. WHD and ICE are working together on the independent contractor issue, and some analysts believe that WHD may be providing leads to ICE on potential Fair Labor Standards Act violators.

It is unclear which industries are targeted, but it is expected that they may include agriculture, construction, distribution, food processing, hospitality, janitorial services, landscaping, manufacturing, restaurants, and sanitation, according to the Society for Human Resource Management.

The Alliance of Business Immigration Lawyers (ABIL) recommends preparing for audits in advance and contacting your ABIL member for guidance on how to classify workers as employees or independent contractors, and how to conduct an internal audit to correct errors or omissions in I-9 work authorization verification forms and other relevant documentation.

Back to Top

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2. District Court Finds NY Education Law Limiting Pharmacist Licenses to U.S. Citizens, LPRs Unconstitutional

The U.S. District Court for New York ruled in a consolidated case on September 29, 2010, that a New York education law was unconstitutional because it violated the plaintiffs' rights under the Equal Protection Clause of the U.S. Constitution and encroached on federal immigration authority.

The plaintiffs were 26 otherwise qualified pharmacists with temporary authorization to work in the U.S. Twenty-two of them had obtained H-1B visas. Most had applied for permanent residence and all had remained in the U.S. in compliance with federal immigration laws while their cases were pending. New York Education Law § 6805(1)(6) provides that "[t]o qualify for a pharmacist’s license, an applicant shall...be a United States citizen or an alien lawfully admitted for permanent residence in the United States." The law excludes, among others, those who have received federal authorization to work in the U.S. temporarily.

Among other things, the court said:

> The theory is that courts must be wary of state laws that exploit aliens' political powerlessness by denying them the fruits of their societal contributions. Here, the State does not explain why this theory would apply any less to nonimmigrants, who also work, pay taxes, contribute to society, and have no political voice while they remain in this country. At one point, the State seems to suggest that non-LPR classifications should not receive strict scrutiny because non-LPRs have a different "constitutional status" by virtue of their weaker ties to the country....But what does it mean to say that nonimmigrants have a different "constitutional status" than LPRs, or that nonimmigrants "need not" be protected to the same extent as LPRs? The Supreme Court has already established that all aliens, even undocumented aliens, have rights under the equal protection clause.

The court pointed out that New York purported to ameliorate the dangers posed by transient or judgment-proof pharmacists through § 6805(1)(6), which was aimed at only a tiny subclass of pharmacists, instead of imposing generally applicable insurance or similar malpractice-related requirements upon the entire profession. The state also did not put forth any evidence that transience among New York pharmacists threatened public health or that nonimmigrant pharmacists, as a class, were considerably more transient than LPR and U.S. citizen pharmacists. As a consequence, the court said, the law did nothing to reduce the dangers of transience among citizen and LPR pharmacists while at the same time excluding longtime nonimmigrant residents, many of whom will become LPRs as soon as their pending green card applications are processed. "The question is not close; under any form of heightened scrutiny, § 6805(1)(6) fails," the court concluded.

The decision is available at http://engnishimura.com/files/PhamacistLawUnconstitutional.pdf.

Back to Top

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3. USCIS Designates Two AAO Decisions As Binding Precedent

U.S. Citizenship and Immigration Services (USCIS) announced on October 20, 2010, that it has issued two decisions from the Administrative Appeals Office (AAO) as binding precedent for the agency.

The first decision, *Matter of Al Wazzan*, affirms USCIS's denial of an application to adjust status to permanent residence and holds that an employment-based petition must be "valid" initially if it is to "remain valid with respect to a new job." The second decision, *Matter of Chawathe*, reverses USCIS's denial of an application to preserve residence for

naturalization purposes and clarifies the definition of employment by an "American firm or corporation."

Matter of Al Wazzan states that to be considered "valid," a petition must have been filed for a person who is entitled to the requested classification and a USCIS officer must have approved the petition. An unadjudicated immigrant visa petition is not made "valid" merely through the act of filing the petition with USCIS or through the passage of 180 days, even though the law states that an employment-based immigrant visa petition remains valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remains unadjudicated for 180 days.

Matter of Chawathe states that for purposes of establishing the requisite continuous residence in naturalization proceedings, a publicly held corporation may be deemed an "American firm or corporation" if the applicant establishes that the corporation is both incorporated in the U.S. and trades its stock exclusively on U.S. stock exchange markets. The decision also states that when an applicant's employer is a publicly held corporation incorporated in the U.S. and trading its stock exclusively on U.S. stock markets, the applicant need not demonstrate the nationality of the corporation by establishing the nationality of those persons who own more than 51 percent of the stock of that firm. The decision further states that even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant has satisfied the standard of proof. If the director can articulate a material doubt, he or she may request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, may deny the application or petition, the decision states.

Matter of Al Wazzan is available at http://www.justice.gov/eoir/vll/intdec/vol25/3699.pdf, and *Matter of Chawathe* is available at http://www.justice.gov/eoir/vll/intdec/vol25/3700.pdf.

Back to Top

4. State Dept. Seeks OMB Approval, Comments on Exchange Visitor Program Annual Reports

The Department of State (DOS) has sent for Office of Management and Budget (OMB) approval a notice and request for comments on annual reports required from designated exchange visitor program sponsors to assist DOS in overseeing and administering the J-1 visa program. The reports provide statistical data on the number of exchange participants an

organization has sponsored per category of exchange, a summary of the activities in which exchange visitors were engaged, and an evaluation of the program's effectiveness. Program sponsors include government agencies, academic institutions, and private sector not-for-profit and for-profit entities. The estimated number of respondents annually is 1,460.

Annual reports are completed through the Student and Exchange Visitor Information System (SEVIS), printed and signed by a sponsor official, and sent to DOS by mail or fax. DOS said it is working with the Department of Homeland Security (DHS) to expand SEVIS functions and enable the collection of electronic signatures. Annual reports will be submitted to DOS electronically "as soon as the mechanism for doing so is approved and in place," the agency said. DHS announced a delay in implementing SEVIS II in April 2010. Phase one, the creation of customer accounts and the migration of school and sponsor records, was planned to start in March 2010, and phase two, full operating capability, was planned to deploy in October. DHS said a final decision on the schedule has not been reached, but confirmed that SEVIS II will not be deployed this year.

Comments or requests for additional information may be sent to the offices listed in the OMB notice, which is available at http://edocket.access.gpo.gov/2010/pdf/2010-26381.pdf. For details on the SEVIS II delay, see http://www.ice.gov/sevis/sevisii/sevisii_update_032010.htm.

Back to Top

5. USCIS Opens New Office in Holtsville, Long Island

U.S. Citizenship and Immigration Services (USCIS) recently announced the opening of a new full-service field office in Holtsville, Long Island, New York. The office has the capacity to serve approximately 400 residents of Nassau, Suffolk, and Queens Counties per day, including fingerprinting.

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=22a20d1fd9bab210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Back to Top

6. ABIL Global: India Changes Work-Related Visa Rules

In an effort to protect India's lesser skilled workers and attract highly skilled foreign workers, the Indian Ministry of Home Affairs (MHA) has issued an

order and released a new FAQ (frequently asked questions) document stating that employment visas are intended for foreigners desiring to come to India to work if the applicant is a highly skilled and/or qualified professional engaged or appointed by a company, organization, or industry undertaking in India on a contract or employment basis.

Employment visas will not be granted for positions for which qualified Indians are available, the FAQ states. Also, employment visas will not be granted for "routine, ordinary or secretarial/clerical jobs." The foreign national must seek to visit India for employment in a company, firm, or organization registered in India or for employment in a foreign company, firm, or organization engaged in the "execution of some project in India." Further, the FAQ states, the foreign national being sponsored for an employment visa in any sector should draw a salary above US $25,000 per year, with the exception of ethnic cooks, language teachers (other than English) and translators, and staff working for the "concerned Embassy/High Commission in India."

The MHA also has announced the elimination of the prior maximum of 1% of the total workforce, or up to 20, for each Indian company that sponsors foreign workers.

The employment visa must be issued from the country of origin or country of domicile of the foreigner, provided the period of permanent residence of the applicant in that country is more than 2 years.

Documentation pertaining to the proposed employment, such as registration of the company under the Companies Act, proof of registration of the firm in the State Industries Department or the Export Promotion Council concerned, or any recognized promotional body in the field of industry and trade, will be reviewed to decide the category of visa that may be issued.

The name of the sponsoring employer or organization must be clearly stipulated in the visa sticker.

The following categories of foreign nationals are also eligible for employment visas provided they meet the basic conditions for an employment visa:

(i) Foreign nationals coming to India as consultants on a contract for whom the Indian company pays a fixed remuneration (this may not be in the form of a monthly salary).

(ii) Foreign artists engaged to conduct regular performances for the duration of an employment contract given by hotels, clubs, or other organizations.

(iii) Foreign nationals coming to India to take up employment as coaches of national or state-level teams or reputed sports clubs.

(iv) Foreign sportsmen who are given contracts for a specified period by Indian clubs or organizations.

(v) Self-employed foreign nationals coming to India for providing engineering, medical, accounting, legal or other such highly skilled services in their capacity as independent consultants, provided the provision of such services by foreign nationals is permitted under law.

(vi) Foreign language teachers and interpreters.

(vii) Foreign specialist chefs.

(viii) Foreign engineers or technicians coming to India to install and commission equipment, machines, or tools under the terms of a contract for the supply of such equipment, machines, or tools.

(ix) Foreign nationals deputed for providing technical support or services, or transfer of know-how or services, for which the Indian company pays fees or royalties to the foreign company.

Regarding the duration of the employment visa, the rules have different validity dates depending on the employment arrangement. These are summarized as follows:

(i) A foreign technician/expert coming to India under a bilateral agreement between the Indian government and the foreign government, or pursuant to a collaboration agreement that has been approved by the Indian government, may be granted a multiple employment visa for the duration of the agreement, or for a period of five years, whichever is less.

(ii) Highly skilled foreign personnel being employed in the IT software and IT-enabled sectors may receive a multiple entry employment visa with a validity of up to three years or for the term of assignment, whichever is less.

Applicants who are not covered under any of these two arrangements may obtain a multiple entry employment visa for up to two years or the term of assignment, whichever is less.

Finally, the rules provide for extensions beyond the initial visa validity period, up to a total period of five years from the date of issue of the initial employment visa, on a year-to-year basis, subject to the individual's good conduct, production of necessary documents in support of continued employment, filing of income tax returns and to there being no adverse

security inputs relating to the foreign national. The period of extension shall not exceed five years from the date of issue of the initial employment visa.

The FAQ, which contains additional details on business and work-related visas issued by India, is available at http://www.mha.nic.in/pdfs/work_visa_faq.pdf.

Back to Top

7. ABIL Global: Canadian Regulatory Changes Will Affect Canadian Employers, Temporary Foreign Workers

Various changes to Canada's Immigration and Refugee Protection Regulations will take effect on April 1, 2011, affecting both Canadian employers and their temporary foreign workers. These changes are intended to:

- Reduce the opportunity for exploitation of temporary foreign workers by employers and third-party agents;
- Ensure greater employer accountability mechanisms, including a denial of service provision, thereby encouraging greater adherence by employers to the terms and conditions of their job offers with respect to wages, working conditions and occupations; and
- Clarify that employment facilitated through the Temporary Foreign Worker Program is meant to be temporary in nature.

The changes include:

Rigorous assessment of the genuineness of the employment offer. The amendments establish specific factors to assess the genuineness of an employer's offer of employment to a foreign worker both in Labour Market Opinion (LMO) cases and in LMO-exempt cases. These factors include:

- Whether the offer is made by an employer that is actively engaged in the business with respect to which the offer is made;
- Whether the offer is consistent with reasonable employment needs of the employer;
- Whether the terms of the offer are terms that the employer is reasonably able to fulfill; and
- The past compliance of the employer, or any person who recruited the foreign national for the employer, with the federal or provincial laws

that regulate employment, or the recruiting of employees, in the province in which it is intended that the foreign national work.

Ban on employers for noncompliance with a previous LMO. The amendments will render an employer ineligible to seek a work permit on behalf of a foreign worker unless, during the period beginning two years before the initial request for an LMO is made to Service Canada or, in the case of an LMO-exempt work permit, beginning two years before the work permit application is received by Citizenship and Immigration Canada (CIC) or the Canada Border Services Agency (CBSA):

- The employer provided each of its foreign workers with wages, working conditions and employment consistent with the wages, working conditions and occupation set out in the employer's offer of employment; or the failure to do so was justified.

Justifications include:

- A change in federal or provincial law;
- A change in the provisions of a collective agreement;
- The implementation of measures by the employer in response to a dramatic change in economic conditions that directly affected the employer, provided that the measures were not directed disproportionately at foreign nationals employed by the employer;
- An error in interpretation made in good faith by the employer with respect to its obligations to a foreign national, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error;
- An unintentional accounting or administrative error made by the employer, if the employer subsequently provided compensation or made sufficient attempts to do so to all foreign nationals who suffered a disadvantage as a result of the error; or
- Circumstances similar to those set out above.

The assessment is undertaken when a new LMO is requested or, in the case of an LMO-exempt work permit application, when the work permit application is received by CIC/CBSA. Employers must review all LMO applications to ensure compliance during the two-year period preceding April 2011. An internal immigration audit is recommended.

List of banned employers posted on CIC Web site. The amendments authorize CIC to maintain a list of banned employers on its Web site, listing the names and addresses of each employer and the date that the determination was made. Service Canada will not issue an LMO and CIC/CBSA will not issue a work permit for any employer on the list.

Four-year cap for most temporary foreign workers. The amendments provide for a cumulative four-year cap for most foreign workers. However, exemptions from the four-year cap exist in the following situations:

- The foreign worker intends to perform work that would create or maintain significant social, cultural or economic benefits or opportunities for Canadian citizens or permanent residents. Therefore, work permits based on LMO exemptions, such as significant benefit to Canada and intra-company transferees, along with other LMO exemptions, will be exempt from the four-year cap.

- The foreign worker intends to perform work pursuant to an international agreement between Canada and one or more countries. Work permits issued under international agreements such as the North American Free Trade Agreement, the General Agreement on Trade in Services, the Canada-Chile Free Trade Agreement, or the Peru Free Trade Agreement will be exempt from the four-year cap.

- A foreign worker who has reached the four-year cap is not necessarily required to leave Canada. However, the foreign worker would not be eligible for a work permit even under another category. He or she may be permitted to apply for status under a non-work category such as that of a visitor or student.

Back to Top

Member News

Klasko, Rulon, Stock & Seltzer received the highest ranking (Tier 1) for the Immigration Law category in both New York and Philadelphia in the first-ever U.S. News and World Report "Best Law Firm" rankings. See http://bestlawfirms.usnews.com/. H. Ronald Klasko (bio: http://www.abil.com/lawyers/lawyers-klasko.cfm) is a member of the Alliance of Business Immigration Lawyers.

Angelo Paparelli (bio: http://www.abil.com/lawyers/lawyers-paparelli.cfm) recently posted a new blog entry, "The Immigration Log In Our Eyes." The blog is available at http://www.nationofimmigrators.com/?p=359.

Charles Kuck (bio: http://www.abil.com/lawyers/lawyers-kuck.cfm) recently posted a new blog entry, "What Is Going On in Nevada With Immigration?" The blog is available at http://musingsonimmigration.blogspot.com/2010/10/what-is-going-on-in-nevada-with.html.

Mr. Kuck recently conducted a radio interview with Mr. Paparelli about the immigration system. The interview is available at http://www.radiosandysprings.com/podcasts/ImmigrationHourOct26.2010.mp3.

Stephen Yale-Loehr (bio: http://www.abil.com/lawyers/lawyers-loehr.cfm) will speak about the prospects for immigration reform after the mid-term elections at 1:30 p.m. on November 15, 2010, at the National Press Club in Washington, DC.

Back to Top

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/bulletin/bulletin_1360.html

Back to Top

The Alliance of Business Immigration Lawyers (ABIL) offers a single point of contact for customer needs, news alerts, staff training and other programs that benefit clients through the collaboration of more than 150 member attorneys and their 400+ 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/.

Disclaimer/Reminder

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Back to Top