

NEWS UPDATE

December 19, 2011

H-1B Professional Visa Cap Reached

On November 23, USCIS announced that all available H-1B temporary professional visa petitions had been taken for the current fiscal year (October 1, 2011 to September 30, 2012). Cap-subject employers seeking to employ new professional workers now must find alternative visa options or wait until April 1, 2012 to file new petitions for employment commencing October 1, 2012. H-1B transfer and extension petitions may be submitted at any time for those H-1B workers who already possess H-1B status. Petitions for physicians with certain J waivers, and petitions filed by institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations, or governmental research organizations are also exempt from the cap.

Under immigration laws, visas for professional specialty workers are capped at 65,000 per fiscal year. Another 20,000 visas are available to workers with advanced degrees (master's or higher) obtained at U.S. institutions of higher education. For the third year in a row, H-1Bs remained available for many months after the U.S. government began accepting applications. Prior to the U.S. financial crisis, all 85,000 visas had been exhausted the first day of filing, April 1. This year, these visas were exhausted two months earlier than last year, a sign that the economy may be recovering.

Please contact us no later than February 1, 2012 to initiate new H-1B petitions for the April 1, 2012 filing.

Update on PERM Labor Certification Program: Audits on Rise; Wage Determinations "Current"

PERM audits are on the rise again, and employers sponsoring foreign workers need to take care that they are strictly complying with the requirements of the PERM labor certification program. Job requirements, advertising, and recruitment are the key areas for PERM audits. In this time of high unemployment, recruitment is an area that is especially vulnerable to an audit. Employers must maintain good records of their recruitment efforts and applicant pool, including vetting applicants and managing applicant responses. A current trend in PERM Audits is to request that the employer provide proof of how and when rejected applicants were notified of the selection process; however, employers **are not required** under the PERM regulations to tell applicants that they have been rejected. Supervised recruitment – which can cost an employer thousands of additional dollars on advertising alone – also is on the rise, especially in professional occupations where the requirements include configurations that offer alternatives to bachelor's degrees, where the job is entry level with no requirements, in lower level financial industry jobs, and in restaurant industry positions irrespective of the status of the foreign national.

The Department of Labor also announced that it has cleared up its backlog, and is again issuing prevailing wage determinations for PERM cases within 60 days of submission.

USCIS Resumes Sending Original Approval Notices (I-797) to Attorney of Record

USCIS announced that it has restored the practice of sending *original* I-797 receipt and approval notices to the applicant's or petitioner's G-28 attorney of record. In mid-September, USCIS began sending these important notices directly to applicants and petitioners, causing a myriad of unintended consequences.

Immigration Forecast: the Legislature, the Judiciary, and the Executive

Fairness for High-Skilled Immigrants Act: On November 29, 2011, the House of Representatives passed HR 3012, the Fairness for High-Skilled Immigrants Act with overwhelming bi-partisan support. The Act would eliminate the current per-country cap on the employment-based visas and is designed to eliminate long wait times for workers from high-demand countries such as India and China. The bill does not make any change in the overall number of green card visas available each year for skilled and professional workers and their dependents (140,000). It also increases the family-based per-country cap from 7 percent to 15 percent. The bill will next be considered by the Senate.

Visa Waiver Program: The Visa Waiver Program (VWP) is also subject of scrutiny as many call for its expansion. The program allows nationals from 36 countries to visit the United States for 90 days or less without securing a visa in advance. The House hearing follows a recent State Department announcement that the U.S. is falling far short of meeting a growing worldwide demand for visas, undermining U.S. competitiveness now and into the future. It is unclear from the hearings whether any substantive changes will be made, though some countries, including Taiwan, are hopeful to be included if the program expands.

EB-5 Investor Program: The EB-5 Entrepreneur Investor Visa Program is up for review. Created in early 1990s and lauded as a job creator and a vehicle to drive the economy, the program has been perennially underutilized, issuing fewer than 2,500 visas in 2010 out of a possible 10,000. A Senate reauthorization hearing on December 7 was to review the Regional Center program, a component of the EB-5 program that permits a \$500,000 investment in targeted employment areas in approved pooled investment programs instead of a \$1 million, and is set to sunset in 2012. Most observers agree that the program will be reauthorized, perhaps permanently.

Secure Communities: A House of Representatives hearing led by Representative Steve King (R-IA) was the first-ever congressional review of Secure Communities, the three-year-old program where the FBI shares the fingerprint data of arrestees from local (and state) law enforcement agencies with DHS. For several years now the program has been criticized for leading to racial profiling and interfering with community policing. After findings of discriminatory policing practices within the Maricopa County Sheriff's Office (MCSO) in Arizona, DOJ also announced the termination of its section 287(g) agreement with the MCSO and the restriction of MCSO's access to the Secure Communities program.

U.S. Supreme Court Enters Arizona Fray: On December 12, 2011, the U.S. Supreme Court agreed to hear the controversial Arizona S.B. 1070 anti-immigration law case. You may recall that S.B. 1070 includes the requirement that state-law enforcement officials determine the immigration status of anyone they stop or arrest if the officials have reason to believe that the individual might be an undocumented immigrant. The Supreme Court's ultimate decision in the case, however, may not have precedential value. Justice Elena Kagan will not take part in the decision of the high court (she worked on the issue previously while solicitor general) which raises the prospect of a 4 to 4 vote. If that were to happen, the Court's decision would carry no precedential significance for the other state laws being challenged. The Court is expected to hear the case in April.

Federal Court Challenges to Utah and South Carolina State Immigration Laws: In addition to suits in Arizona and Alabama, the Department of Justice (DOJ) recently filed a lawsuit in federal district court challenging a South Carolina law, Act No. 69, parts of which go into effect on January 1, 2012. Filed on behalf of the Departments of State, Justice, and Homeland Security, the lawsuit argues that certain provisions of the South Carolina law are unconstitutional and interfere with the federal government's authority to set and enforce immigration policy. On November 23, 2011, DOJ filed suit against Utah to block implementation of HB 497, which mandates that local police enforce immigration laws.

These laws are similar to those in Arizona (SB 1070) and Alabama. The same day the Supreme Court accepted review of Arizona's SB 1070, a federal court blocked a provision of Alabama's immigration law that would have forced undocumented immigrants to leave their mobile homes. DOJ is also reviewing laws in Georgia and Indiana that already have been challenged by private groups and individuals. In its press releases announcing these lawsuits, DOJ cited the irreparable harm caused by the laws, including "the harassment and detention of foreign visitors and legal immigrants, as well as U.S. citizens, who cannot readily prove their lawful status."

Prosecutorial Discretion: A new policy between the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE), encouraging the exercise of prosecutorial discretion in appropriate cases, was launched in mid-November, and is being piloted in Baltimore and Denver from December 4 through January 13, 2012. DHS had announced in June its intent to eliminate low priority cases from the immigration court dockets and instead focus its enforcement priorities on the removal of those who have broken criminal laws, threats to national security, recent border crossers, repeat violators of immigration law, and immigration court fugitives. The pilot program is designed to identify cases most clearly eligible and ineligible for a favorable exercise of discretion. Ultimately, DHS expects to implement "best practices" on an ongoing basis nationwide.

If you have any questions, email us at contactRS@rudnickspector.com.

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