Global Immigration News

Delivering Global Business Immigration Services

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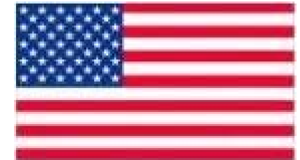

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Get Ready to File H-1Bs

The filing period for "new" H-1B petitions to be counted against the annual H-1B quota (the "H-1B cap") for Fiscal Year 2011 (FY 2011) begins on April 1, 2010. Employers are encouraged to begin identifying current and future employees who will need H-1B visa status to be legally employed. **Individuals currently employed as F-1 students or J-1 trainees, individuals seeking to change to H-1B from another work status (such as L-1, TN or E-3) and individuals outside of the United States commonly require new, cap-subject H-1Bs.** March 31 is the initial filing date for petitions seeking H-1B status with an effective date of October 1, 2010. (Petitions actually need to be mailed on March 31 to secure receipt by United States Citizenship and Immigration Services on April 1.)

In Fiscal Years 2008 and 2009, the number of cases filed during the first few days of April exceeded the cap, resulting in a random, computer-generated lottery for available H-1B visa numbers. However, Fiscal Year 2010 filing began April 1, 2009, but the cap was not reached until December 21, 2009. As no one can tell what the demand for H-1Bs will be on April 1 of this year and thereafter, **it is prudent for employers to immediately begin identifying persons for whom H-1B sponsorship will be needed.** This will allow sufficient time for petition preparation, including the week or more required to file and receive certification of the prerequisite Labor Condition Application (LCA). (See the February 2, 2010 issue of the *Immigration eAuthority* for more information on the upcoming H-1B filing period.)

New Scrutiny of H-1B/L-1 Travelers on Reentry

Returning H-1B, L-1, and employment-based visa holders may face new scrutiny when entering the United States. There were several recent reports that certain H-1B workers were subjected to intense review and even refusal of admission by U.S. Customs and Border Protection (CBP) officers at the Newark, New Jersey airport port of entry. In at least some of these instances, CBP officials were assisting in investigations involving certain H-1B nonimmigrants from India and certain H-1B petitioner companies. The CBP officer questions included who the individuals worked for, how their pay was computed, who paid their salary, what their job duties were, and what they were paid. In some cases, the individuals were subjected to expedited removal and had their visas cancelled.

Reports indicate that several of these cases involved companies under investigation by U.S. Immigration and Customs Enforcement (ICE) and/or United States Citizenship and Immigration Services (USCIS) for ongoing fraud. In the Newark enforcement actions, CBP Newark worked closely with USCIS – Fraud Detection and National Security (FDNS) and the Department of Labor – Office of Investigations. In addition, CBP Newark apparently implemented a policy of conducting random checks for returning H-1B, L-1, and other employment-based visa holders. If the individual's admissibility is deemed questionable during primary inspection, he or she will be sent to secondary inspection for further questioning. If CBP discovers discrepancies in previously filed petitions, it is possible that the applicant may be asked to withdraw his or her application for admission into the United States or be subject to expedited removal (an immediate deportation that can include a five-year bar on readmission).

What can employers of H-1B, L-1, or other foreign national workers expect in the near term? While the initial reports are focused on Newark, one can reasonably expect similar tactics to be introduced at other ports of entry as well. These efforts seem to be the next stage of fraud detection, following the H-1B employer site visits that started in the summer of 2009 by FDNS (see the August 2009 issue of the *Immigration eAuthority*). Thus, H-1B travelers seeking readmission may be asked about facts surrounding H-1B petitions. Those questioned may be offered the opportunity to contact their home country consulate. (CBP's position is that applicants for admission have no right to counsel and therefore will not be accorded an opportunity to contact an attorney.) CBP officers may contact the petitioner and/or current employer for clarification of facts about the H-1B employment. If upon a review of the facts the CBP officer determines the H-1B individual to be inadmissible (which could be due to a simple documentary deficiency or visa/petition fraud), CBP may allow the applicant to withdraw his or her application for admission (and depart the United States) or subject the applicant to expedited removal should the totality of the circumstances warrant.

What can be done to ease anxiety and problems encountered upon reentry to the United States? Employers must be prepared for possible ad hoc telephone inquiries from CBP officers at ports of entry. Designating a responsible person (and filing H-1B petitions with the person's contact information listed in the employer sections on Form I-129) to respond to CBP calls might be helpful. The designated person should be familiar with the H-1B petition facts and/or have access to a copy of the H-1B petition as well as current employment information (*e.g.*, salary, etc.). H-1B, L-1, or other foreign national workers should be provided a copy of his or her petition and make themselves familiar with the basic information provided therein. Both employers and foreign national workers should be mindful of information provided in any public forum, particularly on the Internet. H-1B and L-1 petition approval notices now contain specific "warnings" indicating that government officials may seek information from a variety of sources to review continued eligibility for the status. CBP officials at ports of entry may thus visit company websites, worker postings to

social networking sites (such as Facebook, Twitter, etc.) to compare the information contained in the petition, responses from the worker applying for readmission, and statements from employers made in response to a CBP telephone call. Where inconsistencies exist, the worker may be refused admission.

It would seem likely that many of the more intense reviews of travelers are commonly pre-determined – for example, based on an FDNS audit that concluded employer fraud was possible or likely – and thus even the best preparation cannot prevent an inquiry from occurring. However, a bit of preparation by both the employer and foreign national can help reduce the uneasiness and optimize the chances of a positive outcome.

Traveler Updates – Visa Waiver and Visa Applications

Visa Waiver Entrants Need ESTA Registration (Really!)

Are executives from your foreign operations traveling to the United States for business meetings soon? Be aware that U.S. Customs and Border Protection (CBP) made Electronic System for Travel Authorization (ESTA) registration mandatory for travel to the United States under the Visa Waiver Program (VWP) in January 2009. The VWP enables citizens and nationals from 35 countries to travel to and enter the United States for business or visitor purposes for up to 90 days without obtaining a visa. As of January 12, 2009, VWP travelers needed to complete ESTA registration prior to boarding a flight to the United States.

CBP recently issued a news release announcing that it will commence active enforcement of the ESTA requirement on March 21, 2010. After that, carriers (such as airlines) will be fined for boarding VWP travelers who have not completed registration and VWP travelers will likely be refused entry to the United States. Reports indicate that nearly 10 percent of all VWP travelers have not been completing ESTA registration, yet many have not been prohibited from boarding flights and entering the United States. The new CBP policy will likely end such leniency and refusals to board passengers will be more common.

Note that U.S. citizens and permanent residents, foreign nationals with a valid U.S. visa, and Canadian citizens do NOT need to complete ESTA registration prior to traveling to the United States.

For more information on the VWP, click here. For information on registering for ESTA, click here.

DS-160 Required of More Visa Applicants

By April 30, 2010, all nonimmigrant visa (H-1B, L-1, B-1, etc.) applicants will be required to complete the electronic DS-160 form prior to appearing at a U.S. Consulate or Embassy for a visa application. While several consular posts have been requiring DS-160 completion for some time, more and more consulates are requiring the DS-160 as the April 30 deadline approaches. Visa applicants should visit the U.S. State Department's website for more information on the DS-160 and check with the applicable U.S. Consulate or Embassy for current procedures by clicking here and scrolling down for a list of embassies and consulates.

Compliance Corner – State E-Verify and I-9 Laws

South Carolina: Audits Conducted, Citations Issued, But Initial Fines Waived

South Carolina's 2008 law requiring employers to take additional steps to verify the work status of newly hired persons is in the process of being implemented. The law's requirement that employers either participate in E-Verify (the electronic employment eligibility verification system operated by United States Citizenship and Immigration Services) or review an approved driver's license or state-issued identification card of newly-hired employees is being phased in. Currently private employers with 100 or more employees are subject to the additional verification requirement. After some initial aggressive enforcement tactics last summer, the South Carolina Department of Labor, Licensing and Regulations (LLR) has settled into a more defined process for auditing compliance with the law.

More recently, reports indicate that LLR has been steadily auditing businesses and processing tips from the public about possible violators, with nearly 90 audits being performed in the month of January. Over 30 of the audited businesses were cited for violations. Fines for non-compliance have been issued including one for $42,500. However, the penalties are waived for a first-time violation and if corrective steps are immediately taken by affected employers. The audits will likely continue as the law is expanded to include all businesses on July 1, 2010. Employers are reminded to review current verification procedures to ensure compliance with not only federal law but also state law.

Oklahoma: Injunction Against E-Verify Requirement Reversed

Oklahoma's Taxpayer and Citizen Protection Act of 2007 contains a provision requiring employers that contract with the state to use E-Verify, the Internet-based system operated by United States Citizenship and Immigration Services that allows employers to verify the employment eligibility of employees. This provision of the law was challenged as unconstitutional by several business organizations led by the U.S. Chamber of Commerce. The primary argument of the U.S. Chamber was that the law conflicts with the federal Immigration Reform and Control Act (IRCA) and therefore is preempted.

In June 2008, a federal district court found that the U.S. Chamber was likely to prevail on the merits and therefore issued a preliminary injunction against enforcement of the law's E-Verify provision. On appeal, the Tenth Circuit Court of Appeals reversed the district court's grant of a preliminary injunction against enforcement of the E-Verify provision. Thus, it appears that Oklahoma may soon be able to enforce the E-Verify provisions of the law.

If you have any questions relating to this alert, please contact your Emigra Ogletree Worldwide representative or Account Manager.

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