

AUGUST 2006

Introduction:

The law firm of Klasko, Rulon, Stock & Seltzer LLP is pleased to present our August 2006 newsletter covering immigration topics that are of interest to our clients. This newsletter is published in conjunction with The Academy of Business Immigration Lawyers (ABIL).*

1. H-1B Exemption Cap Reached for FY 2007

U.S. Citizenship and Immigration Services (USCIS) announced on July 28, 2006, that it has met the exemption limit of 20,000 for fiscal year (FY) 2007 for H-1B petitions requesting foreign workers who have earned a master's or higher degree from a U.S. institution of higher education. Petitions received on July 26, 2006 are being subjected to a random selection process, described below, and USCIS will reject petitions requesting such a worker that are received after that date unless the petition is otherwise eligible for a separate cap exemption.

USCIS has implemented the following procedure for FY 2007 H-1B filings:

- If USCIS determines that the numerical limits have been exceeded, the agency will identify those H-1B petitions seeking a FY 2007 number that were received on that date.
- USCIS will then conduct a computer-generated random selection of the petitions received on that date to allocate any remaining FY 2007 H-1B numbers.
- After random selection, any remaining H-1B petitions that do not receive a FY 2007 number and are not otherwise exempt will be rejected and returned.
- Returned petitions will be accompanied by the filing fee.
- Petitioners may resubmit their petitions when H-1B visa numbers become available for FY 2008.
- The earliest date a petitioner may file a petition requesting FY 2008 H-1B employment with an employment start date of October 1, 2007, would be April 1, 2007.

Petitions for current H-1B workers do not count toward the H-1B cap. Accordingly, USCIS will continue to process petitions filed to extend the amount of time a current H-1B worker may remain in the U.S., change the terms of employment for current H-1B workers, allow current H-1B workers to change employers, or allow current H-1B workers to work concurrently in a second H-1B position.

USCIS also noted that petitions for new H-1B employment are exempt from the annual cap if the worker will be employed at an institution of higher education or a related or affiliated nonprofit entity, or at a nonprofit research organization or governmental research organization.

The USCIS announcement is available at
<http://www.uscis.gov/graphics/publicaffairs/newsrels/H1BMasters072806PR.pdf>.

2. USCIS Announces Transfer of Nonimmigrant Worker Cases

U.S. Citizenship and Immigration Services (USCIS) announced on July 26, 2006 that the Vermont Service Center (VSC) recently transferred nearly 5,000 nonimmigrant worker petitions (Forms I-129) to the Texas Service Center (TSC). VSC also transferred approximately 22,000 alien relative immigrant visa petitions (Forms I-130) to the California Service Center (CSC). USCIS said "[c]ustomers should not be alarmed if they receive notices" from TSC or CSC about a case initially mailed to VSC. "When customers receive such a notice, they should route any questions about their case to the service center from which they received their last notice." USCIS said it reserves the right to transfer additional cases in the future should that become necessary to ensure timely case processing in the event of workload surges.

3. DHS Proposes Expanding US-VISIT to Additional Non-U.S. Citizens; GAO Criticizes US-VISIT Contracts

The Department of Homeland Security (DHS) issued a proposed rule on July 27, 2006 that would expand processing under the US-VISIT program to an additional number of non-U.S. citizens, including:

- lawful permanent residents of the U.S.;
- individuals entering the U.S. who seek admission on immigrant visas;
- individuals entering the U.S. who seek admission as refugees and asylees;
- certain Canadian citizens entering the U.S. for specific business or employment reasons (Form I-94 holders) (excluding most Canadian citizens entering the U.S. as B-1/B-2 visitors to shop, visit friends and family, vacation, or take a short business trip);
- individuals paroled into the U.S.; and
- individuals applying for admission to Guam under the Guam Visa Waiver Program.

Those subject to US-VISIT may be required upon entry or departure to provide fingerprints, photographs, or other biometric identifiers. Comments on the proposed rule may be submitted by August 28, 2006. For details, see the announcement (<http://www.dhs.gov/dhspublic/display?theme=43&content=5762&print=true>) and proposed rule (<http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-11993.pdf>).

4. USCIS Discontinues Locally Produced I-688B Employment Authorization Cards

U.S. Citizenship and Immigration Services (USCIS) announced on July 28, 2006 that it is discontinuing local production of Employment Authorization Cards (EACs/Forms I-688B) in

favor of the Employment Authorization Document (Form I-765) produced at one central location. USCIS said the locally produced I-688B lacks security features and is not well-suited to verification.

USCIS explained that as of April 1, 2005, applications for employment authorization were centralized at the USCIS service centers and the National Benefits Center (via the Chicago Lockbox). Some local USCIS offices continued to accept employment authorization applications, however, and produced EACs using local systems. USCIS said that such offices, in their discretion, may continue to accept "certain employment authorization applications until October 1, 2006." After September 1, 2006, however, such local offices will no longer directly process those cases but will forward them for service center processing. Those seeking the fastest service should send their applications directly to the appropriate service center or Chicago Lockbox, as set forth in the I-765 instructions. As of October 1, 2006, USCIS local offices will no longer accept any I-765 filings.

The discontinuation of locally produced EACs will not prohibit people from using InfoPass to schedule an appointment for an interim employment document when USCIS has not adjudicated the original I-765 within 90 days, USCIS said. The agency recommends that applicants seeking to replace an expiring EAD file the I-765 at least 100 days before the current card expires.

The USCIS announcement is at

<http://www.uscis.gov/graphics/publicaffairs/statements/EADFilingCh072806PN.pdf>.

5. DHS Seeks To Create 'Industry Standard' on Building Legal Workforces With New IMAGE Program

The Department of Homeland Security announced on July 26, 2006 an initiative and best business practices to help employers ensure that they are building legal workforces through voluntary partnerships with the U.S. government. The "ICE Mutual Agreement between Government and Employers (IMAGE)" is intended to build cooperative government-business relationships to strengthen hiring practices and reduce unlawful employment of foreign workers. The initiative also seeks to effect greater industry compliance and corporate due diligence through enhanced federal training and education of employers, DHS said.

The DHS said IMAGE has been designed to provide answers to the flood of questions the agency has received from employers seeking information on how to avoid hiring unauthorized workers. "[P]rosecutions are only part of the solution," said DHS Secretary Michael Chertoff. "If the government is going to fully address the problem of illegal alien employment, it must partner with employers, educate them and provide them with the tools they need to develop a stable, legal workforce."

Companies that join the program and comply with the terms of IMAGE will become "IMAGE certified," a distinction that U.S. Immigration and Customs Enforcement (ICE), a DHS agency, believes will become an industry standard. Under the program, ICE will partner with companies representing a broad cross-section of industries. The companies will serve as "charter members" of IMAGE and will be liaisons to the larger business community, DHS said. As part of the program, businesses must adhere to a series of best practices, including the use of the Basic Pilot

employment verification program administered by U.S. Citizenship and Immigration Services. ICE will provide training and education to IMAGE partners on proper hiring procedures, fraudulent document detection, and antidiscrimination laws. ICE will share data with employers on the latest schemes used to circumvent legal hiring processes. The agency also will review the hiring and employment practices of IMAGE partners and will work collaboratively with them to correct "isolated, minor compliance issues."

As a first step, companies must agree to an audit of their Employment Eligibility Verification (I-9) forms, and must use the Basic Pilot program when hiring employees. For more information on this and other USCIS verification programs, see <https://www.vis-dhs.com/EmployerRegistration/StartPage.aspx?JS=YES&AccessMethod=>.

To become IMAGE-certified, partners also must adhere to best practices, including the creation of internal training programs for completing I-9s and detecting fraudulent documents. IMAGE partners must arrange for audits by "neutral parties" and must establish protocols for responding to Social Security no-match letters. ICE also is asking employers to establish a tip line for employees to report violations and mechanisms to self-report violations to ICE. A full list of best practices is available at <http://www.ice.gov/partners/employers/worksites/besthire.htm>.

More information on IMAGE is available at <http://www.ice.gov/partners/opaimage/index.htm>. Frequently asked questions can be found at http://www.ice.gov/partners/opaimage/image_faq.htm. Information packets can be requested at http://www.ice.gov/exec/opaimage/image_program_request.asp. The press release announcing the IMAGE initiative is available at <http://www.dhs.gov/dhspublic/display?theme=43&content=5757&print=true>.

6. Participation in Basic Pilot Verification Program Is Accelerating, USCIS Says

U.S. Citizenship and Immigration Services (USCIS) announced recently that more than 10,000 U.S. employers are participating in the Basic Pilot employment verification program, which allows employers to run online work authorization checks against Social Security Administration and Department of Homeland Security databases. Participation in the free program has more than doubled during the first three quarters of this fiscal year, USCIS said. Participating businesses are verifying the work authorization of over one million new hires each year at 36,000 hiring sites across the U.S.

The program was launched in selected states beginning in late 1997, and was expanded in late 2004 to allow employers in all 50 states and the District of Columbia to participate. Employers may register online for the program at <https://www.vis-dhs.com/EmployerRegistration>.

7. State Dept. Announces Retrogression of India Employment-Based Category, Other News

For August, the Department of State's Visa Office said it has been necessary to retrogress cut-off dates in several employment-based visa categories for India in an effort to hold issuance levels within the applicable annual numerical limits for the affected categories. Employment-based retrogressions include India's employment-based second preference category, which has become

"Unavailable," and India's employment-based third preference category, which has retrogressed to April 1, 2001.

Also, the Department noted that immigrant visa number use is approaching the annual limits for the year in many categories, and the supply of numbers remaining for allocation is limited. Therefore, it is increasingly possible that additional retrogressions of cut-off dates in September, similar to those experienced in August, will occur. Readers should not assume visa availability until the cut-off dates are announced. Categories that could experience retrogressions include the Worldwide employment-based fourth preference category; the China employment-based second and third preference categories; the India employment-based first preference category; and the Mexico employment-based third preference category.

A total of 50,000 numbers were provided for use in the Schedule A (EX) visa category established last May. Visa demand in this category is approaching that limit and may require the establishment of a cut-off date as early as October, the Department reported. Once all 50,000 numbers have been made available under the current limitation, processing under this category will revert to second preference.

Also, the Department has determined the employment-based numerical limits for fiscal year 2006. The numerical limit for the Worldwide employment-based preference category is 143,949.

The full text of the August 2006 Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html.

8. USCIS Issues Final Rule on Affidavits of Support

U.S. Citizenship and Immigration Services (USCIS) issued a final rule, effective July 21, 2006, that applies to any immigrant visa or adjustment of status application decided on or after that date even if the case was filed beforehand. Among other things, the final rule eliminates the affidavit of support requirement in cases where the sponsored immigrant establishes, on the basis of Social Security Administration records, that he or she has already worked, or can be credited with working, 40 quarters of covered employment.

The final rule also clarifies that the sponsor's income in the year in which the intending immigrant filed the application, rather than the earnings last reported to the Internal Revenue Service, generally bears the greatest evidentiary weight in determining whether the affidavit of support is sufficient, although USCIS may request updated evidence.

The law and regulations require the submission of an affidavit of support in the case of an employment-based immigrant if a relative of the immigrant either filed the visa petition or has a "significant ownership interest" in the entity that did so. The interim affidavit of support regulation defined "significant ownership interest" as an ownership interest of five percent or more in a for-profit entity. The final rule retains the five percent threshold adopted in the interim rule.

Also, several commenters asked USCIS whether the affidavit of support requirement applies to employment-based immigrants if the relative with the significant ownership interest is not a U.S. citizen or resident alien. USCIS explained that, for employment-based immigrants, the purpose of the affidavit of support is to ensure that a relative who could file a family-based visa petition will not use employment as a means to avoid the affidavit of support requirement that would apply if the relative were to file a relative visa petition. Relatives who are not U.S. citizens or resident aliens are ineligible to file relative visa petitions. For this reason, the regulations define "relative," for purposes of the affidavit of support requirement, to include only those family members who can file relative visa petitions. The final rule clarifies that a relative must be either a "U.S. citizen or a resident alien" for the affidavit of support requirement to apply to an employment-based immigrant.

The final rule, published in 71 Fed. Reg. 35732–35757 (June 21, 2006), is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/06-5522.pdf>. A related Department of State cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_2863.html.

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 and case status online:

<https://egov.immigration.gov/cris/jsps/index.jsp>

Department of Labor processing times and information on backlogs:

<http://www.ows.doleta.gov/foreign/times.asp>

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

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