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U.S. IMMIGRATION

1. President Signs Border Bill That Increases Fees for Certain Companies Using Many H-1B, L Workers

On August 13, 2010, President Barack Obama signed into law a border enforcement funding bill, H.R. 6080, that would offset certain border security costs by raising fees for certain H-1B and L petitions. The bill was passed in the House of Representatives by voice vote on August 10, and was passed in the Senate by unanimous consent on August 12.

The new law raises by $2,250 for L nonimmigrants the "filing fee and fraud prevention and detection fee" paid by companies that employ 50 or more employees in the U.S., if more than 50 percent of the company's employees are nonimmigrants admitted on L or H-1B visas. The law also raises by $2,000 for H-1B nonimmigrants the fee paid by companies that employ 50 or more employees in the U.S., if more than 50 percent of the company's employees are nonimmigrants admitted on H-1B or L visas. The fee increases are effective now and will stay in effect until September 30, 2014.

USCIS will accept petitions for filing under this new rule, but may issue a Request for Evidence (RFE) if it is unclear whether the increased fee applies to the petition. Petitioners may experience delays in H-1B and L-1 adjudication as USCIS clarifies its standards on meeting this new burden of proof.

The full text of the bill is available *here*.

2. Leaked USCIS Memo Suggests Administrative Alternatives to CIR

A recently leaked internal U.S. Citizenship and Immigration Services (USCIS) memorandum to Director Alejandro Mayorkas outlines a laundry list of administrative relief options "to promote family unity, foster economic growth, achieve significant process improvements and reduce the threat of removal for certain individuals present in the United States without authorization." The memo offers these options as an alternative to Comprehensive Immigration Reform (CIR), in light of Congressional inaction. Suggested action to foster economic growth includes: partnering with the Department of Commerce to administer the EB-5 Immigrant Investor Program; expanding the "dual intent" concept to nonimmigrant categories such as F, O, TN, P and E visa holders; allowing employment authorization for H-4 dependent spouses under certain circumstances; affording workers admitted in nonimmigrant status "a reasonable period of time to conclude their affairs and depart after expiration of their authorized period of employment"; and expanding the availability of the Premium Processing Service. To date, USCIS has not implemented any of the options discussed in the memorandum.

3. USCIS Continues to Accept H-1B Petitions for FY2011

U.S. Citizenship and Immigration Services (USCIS) continues to accept H-1B nonimmigrant petitions subject to the fiscal year (FY) 2011 cap.

As of September 3, 2010, USCIS had received approximately 36,600 H-1B petitions counting toward the 65,000 cap and the Service had received approximately 13,400 petitions counting toward the 20,000 cap for individuals with advanced degrees from U.S. institutions. In 2009, H-1B numbers remained available until December 22, 2009.

When USCIS receives the necessary number of petitions to meet the cap, it will issue a public update that the FY 2011 H-1B cap has been met as of a certain date (the "final receipt date"). The final receipt date will be based on the date USCIS physically receives the petition, not the date that the petition has been postmarked. The date USCIS informs the public that the cap has been reached may differ from the actual final receipt date.

USCIS said it may randomly select the number of petitions required to reach the numerical limit from the petitions received on the final receipt date. USCIS will reject cap-subject petitions that are not selected, as well as those received after the final receipt date.

Petitions filed by employers who are exempt from the cap or petitions filed on behalf of current H-1B workers who have previously been counted against the cap within the past six years will not be subject to the congressionally mandated H-1B cap.

4. USCIS Clarifies 'O' Validity Period When Gap Exists in Itinerary, Promises 2-Week Turnaround for O and P Visas

There have been several recent developments with respect to O and P visas:

On July 20, 2010, U.S. Citizenship and Immigration Services (USCIS) issued clarifying guidance on the "O" nonimmigrant visa petition with regard to determining the appropriate validity period of an approvable petition when a gap exists between two or more events reflected in the itinerary.

The memo explains that the validity dates for the O-1 visa classification are defined by the specific period of time required to perform or participate in a specific event. When reviewing an O-1 petition, the length of time between the scheduled events, also known as a gap, has sometimes been viewed as a gauge to determine whether an itinerary represented one continuous "event" or separate events requiring separate petitions.

In certain cases where there has been a significant gap between events, adjudicators have sometimes concluded that a single petition was filed for separate events rather than a continuous event. In such cases, the petition may have been approved only for a validity period equal to the length of time needed to accomplish what appeared to be the initial specific event rather than the continuous event as represented by the petition.

The memo notes that there is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event. "The regulations speak in terms of tours and multiple appearances as meeting the 'event' definition." The statutory and regulatory background provides flexibility on the length of validity period that may be granted. The memo states:

"The statute and regulations allow for an approval of an O-1 petition for a period necessary to accomplish the event or activity, not to exceed 3 years. Adjudicators should evaluate the totality of the evidence submitted to determine if the activities described in the itinerary are related in such a way that they would be considered an 'event' for purposes of the validity period. When the validity period requested is established though the submission of appropriate evidence, Service Centers should approve a petition for the length of the validity period requested where the law and regulations permit."

The memo is available *here*.

In addition, USCIS promised during a public meeting with stakeholders on July 20, 2010 that processing times for regularly filed O and P visas for performers and athletes will not exceed 14 days. In some previous cases, adjudications reportedly have taken up to four months, and delays have led to missed performances.

5. U.S. Expands Appointment Scheduling for Nonimmigrant Visa Applicants in China

Nonimmigrant visa applicants may now schedule interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang. The U.S. Embassy in Beijing noted that, although the basic application process is the same, specific times and application procedures at each visa issuing office may vary. Before applying for a visa, applicants should check each post's web site for procedures specific to that post.

The notice is available *here*.
Information about making an appointment is available *here*.

SEYFARTH WORKFORCE AUTHORIZATION TEAM (SWATeam)

SWAT News

1. I-9 Final Rule Allows for Electronic Signatures, Scanning, Storage

U.S. Immigration and Customs Enforcement (ICE) has issued a final rule, effective August 23, 2010, providing that employers and recruiters or referrers for a fee who are required to complete and retain the Employment Eligibility Verification Form (I-9) may sign the form electronically and retain it in an electronic format. The final rule makes minor changes to an interim final rule promulgated in 2006.

The final rule's supplementary information notes that the employer does not file the completed I-9 form with the Department of Homeland Security (DHS), but rather the employer retains the completed form and must make it available for inspection upon a request by ICE investigators or other authorized federal officials. Employers must keep the I-9 in their own files for three years after the date of hire of the employee or one year after the date that employment is terminated, whichever is later. Recruiters or referrers for a fee must keep each I-9 for three years after the date of hire. Failure to properly complete and retain each I-9 may subject the employer or recruiter or referrer for a fee to civil money penalties.

Among other things, the final rule clarifies that:

- Employers may use paper, electronic systems, or a combination of paper and electronic systems;
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- Employers need not retain audit trails recording each time an I-9 is electronically viewed, but only when the I-9 is created, completed, updated, modified, altered, or corrected; and,
- Employers may provide or transmit a confirmation of an I-9 transaction, but are not required to do so unless the employee requests a copy.

The final rule, which includes "performance standards" for electronic filing processes and systems, is available *here*.

2. Justice Department: Decisions Not to Hire Persons Based on Need for Visa Sponsorship or Employer Submission Allowed

Katherine A. Baldwin, Deputy Special Counsel for the Department of Justice's Civil Rights Division, noted in a recent letter that, in general, decisions not to hire individuals based solely on their need for visa sponsorship or their need for a written employer submission to U.S. Citizenship and Immigration Services, either currently or in the future, would not be actionable under the antidiscrimination provisions of U.S. immigration law. She noted that only certain classes of

individuals are protected from citizenship status discrimination under the law, including U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents, refugees, and asylees.

The letter, sent on June 29, 2010, to Angelo Paparelli, partner in the Business Immigration Group of Seyfarth Shaw LLP, is available *here*.

3. Preliminary Injunction Blocks Key Provisions of Arizona Immigration Statute

Following the Department of Justice's challenge to Arizona's recently passed immigration law, S.B. 1070, U.S. District Judge Susan Bolton of Phoenix, Arizona, issued a preliminary injunction against key provisions of the new statute. While not striking down the entire law, she blocked the provisions (1) requiring that an officer attempt to determine the immigration status of a person stopped, detained, or arrested if there is a "reasonable suspicion" that the person is unlawfully present, and requiring verification of the immigration status of any person arrested before release; (2) creating a crime for the failure to apply for or carry alien registration papers; (3) creating a crime for an unauthorized alien to solicit, apply for, or perform work; and (4) authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes him or her removable from the U.S.

The preliminary injunction is available *here*.

Recent News From Seyfarth's Immigration Lawyers

Angelo Paparelli was singled out by the American Immigration Lawyers Association (AILA) for its prestigious annual award. The announcement to AILA members says it all:

The American Immigration Lawyers Association (AILA) awarded Angelo A. Paparelli of Seyfarth Shaw LLP in Irvine, CA the 2010 Edith Lowenstein Memorial Award for the advancing the practice of law.

Angelo Alfredo Paparelli, grandson of Italian immigrants, is recognized by his peers and the public as a scholar and leader in immigration law and a passionate advocate for the rights of immigrants, U.S. citizens, and organizations petitioning for immigration benefits. He is listed as a leading lawyer for immigration law by Chambers USA, Best Lawyers in America, and has been named in three annual peer- and client-based evaluations as Corporate Immigration Lawyer of the Year by The International Who's Who of Business Lawyers.

Writing and speaking on immigration law and now blogging at www.nationofimmigrators.com proved to be Paparelli's pathway to recognition. He challenges the status quo, in person and through his writing. He co-authors an immigration column in The New York Law Journal, published numerous articles, and edited a book on worksite compliance. He speaks regularly as a panelist for AILA and others.

Paparelli is an influential voice in the immigration reform movement. His leadership and passion for justice distinguish him from his peers, and inspire others to be in the forefront of change. His reputation as one of the most versatile leaders in the field, in employment and family-based immigration, removal defense and government advocacy, is rooted not only in his years of experience as an immigration attorney, but also as a speaker, educator, advocate, mentor and writer.

In addition to his contributions to the immigration community and as an advocate for immigrants, Paparelli has been a mentor to many young attorneys. He makes himself available to newer practitioners by offering his expertise to anyone eager to learn. His interest in honing newer attorneys reflects his understanding that each immigration attorney has the opportunity and responsibility to advocate for clients and promote a just immigration system. As a teacher, mentor, and attorney, he embodies all the qualities that an immigration attorney should strive to achieve. He represents excellence in every aspect of what it means to be a successful immigration attorney and advocate for immigrants' rights and enlightened immigration laws.

Nicole (Nici) Kersey published a blog entry on July 14, 2010 to the "I-9 and E-Verify Blog" found at www.electronic-i9.com and hosted by LawLogix. Entitled "OSC Enforcement of I-9 Laws on the Rise," Nici commented that while it has been clear for some time that U.S. Immigration and Customs Enforcement and U.S. Citizenship and Immigration Services' Fraud Detection and National Security Office have placed a renewed emphasis on the enforcement of immigration laws and regulations, it now appears that the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) has renewed its focus on enforcement of the I-9 laws. Nici noted that OSC had entered into a settlement agreement with Macy's after one of its stores allegedly discharged an employee after that employee's permanent resident card expired, which I-9 laws do not require. In addition, Nici highlighted an OSC press release publicizing the filing of a lawsuit against a rug manufacturer claiming that the rug manufacturer requested that a U.S. citizen who spoke only limited English produce a green card, even though he presented other documents sufficient to meet I-9 regulations. Nici concluded that employers must be aware of the increased government enforcement in this area and act should accordingly to ensure compliance.

For more information, please contact the Seyfarth attorney with whom you work, or any Business Immigration *attorney on our website.*

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