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ATTORNEYS

Immigration Inbox: News You Can Use

U.S. Immigration:

1. H-1B Cap Reached – H-1B cap-subject petitions reached the limit on April 5.

2. CBP To Launch New Arrival/Departure Record Process for Foreign Visitors – Under the new process, CBP will no longer require international nonimmigrant visitors to fill out a paper Form I-94 Arrival/Departure Record upon arrival to the U.S. by air or sea.

3. State Dept. Introduces Visa Status Check Online – Users can check their U.S. visa application status at the Consular Electronic Application Center (CEAC) on the site by entering the type and case number.

4. Witnesses Argue in Favor of Skilled Immigration at House Hearing – Judiciary Committee Chairman Bob Goodlatte (R-Va.) opened the hearing by noting, among other things, a study finding that each additional 100 immigrants with advanced STEM degrees is associated with an additional 262 jobs for U.S. natives.

5. Effects of Sequestration: CBP Releases Info on Effects on Border, Traveler Programs; USCIS To Lose $151 Million – CBP warned that it anticipates "significant potential impacts to cross-border travel and trade," which will increase as peak travel seasons occur.

6. USCIS Temporarily Suspends Adjudication of Most H-2B Petitions Following Court Order – USCIS has temporarily suspended adjudication of certain I-129 H-2B petitions for temporary non-agricultural workers while the government considers appropriate action in response to the court order in Comite de Apoyo a los Trabajadores Agricolas et al. v. Solis.

Seyfarth Workforce Authorization Team (SWATeam)

1. USCIS Releases New Two-Page I-9 Verification Form, Handbook for Employers – Changes to the I-9 include new fields, reformatting, and revised instructions to both employees and employers

2. No Wages Due If H-1B Employee Is Voluntarily Nonproductive, ALJ Finds – An arts school did not owe an H-1B nonimmigrant employee back pay for voluntarily nonproductive "work" time.

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U.S. Immigration

1. H-1B Cap Reached

U.S. Citizenship and Immigration Services (USCIS) announced on April 5, 2013, that it had received a sufficient number of H-1B petitions to reach the statutory cap for fiscal year (FY) 2014. This was the first time since 2008 that the cap was reached within the first week of the filing period. USCIS also received more than 20,000 H-1B petitions filed on behalf of persons exempt from the cap under the advanced degree exemption. The agency is not accepting any more H-1B petitions subject to the FY 2014 cap or the advanced degree exemption.

On April 7, USCIS conducted a computer-generated random selection process ("lottery") for FY 2014 cap-subject petitions received through April 5, 2013. USCIS also conducted a lottery the same day for the advanced-degree petitions. According to USCIS, data entry for H-1B cap-subject cases filed via premium processing should be completed by April 15, 2013. The agency has begun to issue receipts for these applications. Adjudication of the premium processing cases should be completed within the required 15 days from April 15.

In the meantime, data entry for non-premium processing H-1B cases is slated to begin on April 16, 2013, and may proceed until late April or early May. USCIS has cautioned stakeholders that it may not issue receipt notices until May. Cases that are not selected for the lottery may not receive rejection notices until June. Petitioners may convert any non-premium processing case to a premium process case, but a request to convert the case can only be made after its receipt notice is issued.

Employers can file H-1B petitions no earlier than six months in advance of the anticipated start date, so April 1, 2013, signaled the start of what has become an annual race to file petitions as early as possible to ensure acceptance before the cap of 85,000 visas is reached. The 85,000 cap includes the basic cap of 65,000, plus an additional 20,000 H-1B visas available to foreign nationals who have earned an advanced degree (master's or higher) from a U.S. university.

The H-1B cap for fiscal year 2013 was reached in June 2012. The pace of hiring this year meant that heavy demand for new H-1B workers resulted in the new cap being reached in the first few days in April. As in past years, some foreign nationals are not subject to the H-1B cap, including individuals who already have been counted toward the cap in a previous year and have not been outside the United States subsequently for one year or more. Also, certain employers, such as universities, government-funded research organizations, and some nonprofit entities are exempt from the H-1B cap. All other employers should be aware of the H-1B cap.

USCIS' announcement is available *here*.

2. CBP To Launch New Arrival/Departure Record Process for Foreign Visitors

Foreign visitors arriving in the U.S. via air or sea who need to prove their legal-visitor status (e.g., to employers, schools/universities, or government agencies) will be able to access their U.S. Customs and Border Protection (CBP) arrival/departure record information online when the agency begins its records automation process on April 30, 2013.

Under the new process, CBP will no longer require international nonimmigrant visitors to fill out a paper Form I-94 Arrival/Departure Record upon arrival to the U.S. by air or sea. The agency will gather travelers' arrival/departure information automatically from their electronic travel records. CBP said it expects this automation to streamline the entry process for travelers, facilitate security, and reduce federal costs. CBP anticipates that the automated process will save the agency an estimated $15.5 million per year.

Because advance information is only transmitted for air and sea travelers, CBP will still issue a paper I-94 at land border ports of entry.

CBP will phase in the I-94 automation at air and sea ports of entry in April and May. Foreign visitors will continue to receive the paper I-94 until the automated process arrives at their port of entry. Following automation, if travelers need the information from their I-94 admission record to verify immigration status or employment authorization, the record number and other admission information will be available *here*.

With the new CBP process, a CBP officer will stamp the travel document (typically a passport) of each arriving nonimmigrant traveler. The admission stamp will show the date of admission, class of admission, and the date until which the traveler is admitted. Travelers will also receive upon arrival a flier alerting them to go to *here* for their admission record information.

Travelers will not need to do anything differently upon exiting the U.S. Those previously issued a paper I-94 will surrender it to the commercial carrier or to CBP upon departure. If a traveler did not receive a paper I-94, CBP will record the departure electronically via manifest information provided by the carrier or by CBP.

Implementation will begin on April 30 at five pilot ports of entry and will continue to the remaining ports of entry over a total of four weeks.

The CBP Fact Sheet can be found *here*.

3. State Dept. Introduces Visa Status Check Online

The Department of State's Bureau of Consular Affairs has launched "Visa Status Check" online. Users can check their U.S. visa application status at the Consular Electronic Application Center (CEAC) on the site by entering the type and case number.

The service is available *here*.

The CEAC is available *here*.

4. Witnesses Argue in Favor of Skilled Immigration at House Hearing

Skilled immigration was the topic of a hearing held on March 5, 2013, by the House of Representatives Subcommittee on Immigration and Border Security. Judiciary Committee Chairman Bob Goodlatte (R-Va.) opened the hearing. Witnesses included Bruce Morrison, Chairman, Morrison Public Affairs Group (testifying on behalf of IEEE-USA [a unit of the Institute of Electrical and Electronics Engineers, Inc.]; Dean Garfield, President and CEO, Information Technology Industry Council; Deepak Kamra, General Partner, Canaan Partner; and Benjamin Johnson, Executive Director, American Immigration Council.

Rep. Goodlatte noted, among other things, that foreign-born inventors have received 76 percent of patents awarded to top U.S. patent-producing universities in cutting-edge fields like semiconductor device manufacturing, information technology, digital communications, pharmaceuticals, and optics. He cited a study finding by the American Enterprise Institute and the Partnership for a New American Economy that each additional 100 immigrants with advanced STEM (science, technology, engineering, and mathematics) degrees is associated with an additional 262 jobs for U.S. natives. The study also found that immigrants with advanced degrees pay over $22,000 per year in taxes on average but their families receive less than $2,300 in government benefits.

Rep. Goodlatte lamented that despite the "outstanding track record of immigrants in founding some of our most successful companies," the United States only selects less than one percent of immigrants on the basis of entrepreneurial talents. By contrast, he noted, Australia, the United Kingdom, and Canada each select over 60 percent of immigrants on the basis of skills and education. He recommended an approach similar to a House bill that did not pass the Senate last year. That bill would have redirected approximately 50,000 green cards from the diversity visa lottery toward foreign students graduating from U.S. universities with advanced degrees in STEM fields.

Rep. Goodlatte recommended that in the new Congress, all aspects of high-skilled immigration policy should be reviewed with an eye toward improving temporary visa programs for skilled workers, such as those on H-1B and L visas; improving the E-2 temporary visa program for entrepreneurs; offering green cards to aspiring entrepreneurs "that don't demand that they themselves be rich but that instead rely on the judgment of the venture capitalists who have funded them"; reducing backlogs for second- and third-preference employment-based green cards; and seeking to help the United States retain more foreign graduates of U.S. universities.

Mr. Morrison noted that the Immigration Act of 1990 nearly tripled employment-based green cards from 54,000 to 140,000 per year, and set a permanent cap of 65,000 H-1B visas per year. He said this was to encourage employers hiring foreigners for permanent jobs to use legal permanent residence visas, putting them on a path toward citizenship. He argued in favor of providing more green cards for skilled workers and a more direct way for employers to sponsor new hires for green cards as soon as they are hired.

Mr. Garfield said the United States is creating technology jobs faster than we can fill them. He noted that other than a modest permanent change in 2004, the private sector has access to roughly the same number of H-1B visas as it did in

1990. He said the United States is likely to run out of the annual allotment of 65,000 H-1B visas "within weeks" of April 1, "leaving no new hiring options for FY 2014 and forcing businesses to move jobs elsewhere even when they may not want to." Mr. Garfield said his organization recommends reform that helps to fill skilled job openings while accelerating new jobs and new knowledge-driven businesses; supplementing the U.S. workforce with skilled immigration reform; and using skilled immigration reform to maximize work in the United States that could be performed elsewhere.

Mr. Kamra argued in favor of a "StartUp Visa" category. He said the H-1B visa is not a workable solution for starting a company in the United States, since entrepreneurs need to devote themselves full-time to building a new company. He recommended including criteria such as requiring entrepreneur visa candidates to receive legitimate funding and to prove subsequent job creation or company growth. Among other things, he recommended that the required first round of funding for any StartUp Visa recipient not be too high, and that ongoing monitoring of the entrepreneur's progress and milestones account for the high-risk nature of such companies.

Mr. Johnson noted that the talent we seek often comes to the United States not only through employment-based channels but also through family reunification, the admission of refugees and asylees, and even within the population of unauthorized workers. He suggested that the quest for talent is not an isolated enterprise but part of systematic immigration reform. He lamented the reductive "buzz words and myths" that fail to acknowledge the "nuanced and complex role immigration plays in American economic growth, business development, and global competitiveness" and pitting native-born workers against their foreign-born colleagues. He argued in favor of creating a "revamped and revitalized immigration system."

Mr. Johnson recommended reforms that provide job portability, labor protections and economic opportunities for both workers and their families. He said the current system is inflexible and outdated, and argued in favor of a "nimble and efficient system" that responds in real time to the needs of the market by giving employers the ability to fill positions quickly with workers who are protected from exploitation.

5. Effects of Sequestration: CBP Releases Info on Effects on Border, Traveler Programs; USCIS To Lose $151 Million

U.S. Customs and Border Protection (CBP) has released information about the effects of "sequestration" (mandated federal budget cuts under the Budget Control Act of 2011) on traveler and border programs. CBP stands to lose $512 million in fiscal year (FY) 2013 funds, according to the Office of Management and Budget (OMB). CBP warned that it anticipates "significant potential impacts to cross-border travel and trade," which will increase as peak travel seasons occur. The agency noted that, among other things, it will lose "up to several thousand" CBP officers at ports of entry in addition to undergoing "significant cuts" to operating budgets and programs.

CBP said that security will remain the highest priority. The agency noted that all trusted traveler and trader programs, including Global Entry, SENTRI, NEXUS, C-TPAT, and FAST, will be "maintained and emphasized."

CBP said it anticipates the following effects, among others, at ports of entry:

- Increased wait times for personal vehicles and pedestrians at land border ports of entry, with the potential of doubling of peak wait times up to several hours or more at the largest ports, leading to potential gridlock during peak travel seasons;
- Increased wait times at major international airports of up to 50 percent or more, with peak wait times of up to 3-4 hours or more at some gateway airports;
- Reduced flexibility to maintain or extend operating hours or respond to requests for new services.

CBP noted that the cuts are taking place against a backdrop of significant growth in international travel and trade. According to CBP, international air travel has increased by 12 percent over the past three years and is expected to increase an additional 5 percent this year. Also, land border passenger traffic is increasing on both the northern and southern borders.

CBP has launched a Web page to provide information and updates on the effects of sequestration on its operations, available *here*.

Meanwhile, the Office of Management and Budget released a document showing FY 2013 cuts to all federal government branches and agencies resulting from sequestration. Among other things, it shows that U.S. Citizenship and Immigration Services, which is primarily funded from fee-based services, stands to lose $151 million. U.S. Immigration and Customs Enforcement also released several thousand lower-risk detainees in anticipation of budget cuts.

A list of the Department of Homeland Security's cuts begin on page 27 of the OMB publication, "OMB Report to the Congress on the Joint Committee Sequestration for Fiscal Year 2013." See page 7 of the OMB publication for a paragraph explaining what the numbers mean.

The OMB publication is available *here*.

6. USCIS Temporarily Suspends Adjudication of Most H-2B Petitions Following Court Order

USCIS has temporarily suspended adjudication of certain Form I-129 H-2B petitions for temporary non-agricultural workers while the government considers appropriate action in response to the court order entered March 21, 2013, in *Comite de Apoyo a los Trabajadores Agricolas et al. v. Solis*, 2:09-cv-00240-LDD (E.D. Pa).

The court order granted a permanent injunction against the operation of a portion of the 2008 wage rule related to certain prevailing wage determinations and gave the Department of Labor (DOL) 30 days to comply with the court order. Following the order, DOL announced that it can no longer make prevailing wage determinations based on the Occupational Employment Statistics (OES) survey four-tier wage system. DOL said it will, however, continue to process prevailing wage requests not subject to the court order, including prevailing wage determinations using applicable collective bargaining agreements, acceptable private wage surveys, or Service Contract Act or Davis Bacon Act wages. DOL plans to comply with the court order within 30 days by promulgating a revised wage rule.

Accordingly, as noted above, USCIS has temporarily suspended adjudication of H-2B petitions that are accompanied by temporary labor certifications (TLCs) issued by DOL when those TLCs are based on OES four-tier prevailing wage determinations. USCIS has also suspended premium processing for all H-2B petitions until further notice. Petitioners who have already filed H-2B petitions using the premium processing service, and who receive no agency action on their cases within the 15-calendar-day period, will receive refunds. Once a revised prevailing wage rule is promulgated, USCIS will resume adjudication of all H-2B petitions.

USCIS will issue notices on all pending petitions to determine the source of the prevailing wage determination (PWD). USCIS said it will not consider these notices as an "agency action" for premium processing purposes.

If it is determined that a pending petition is accompanied by a TLC that is based on a PWD using applicable collective bargaining agreements, acceptable private wage surveys, or Service Contract Act or Davis Bacon Act wages, USCIS will resume adjudication of the H-2B petition. In addition, USCIS will adjudicate H-2B petitions that are filed with TLCs issued by DOL on or after March 22, 2013. USCIS also will continue adjudicating H-2B petitions for non-agricultural temporary workers on Guam if the petitions are accompanied by TLCs issued by the Guam Department of Labor.

Finally, USCIS may adjudicate an H-2B petition if it can be resolved on issues unrelated to the OES four-tier prevailing wage determination.

Seyfarth Workforce Authorization Team (SWATeam)

1. USCIS Releases New Two-Page I-9 Verification Form, Handbook for Employers

U.S. Citizenship and Immigration Services (USCIS) has released a revised Employment Eligibility Verification Form (I-9), effective March 8, 2013. All employers must complete an I-9 for each employee hired in the United States.

Changes to the I-9 include new fields, reformatting, and revised instructions to both employees and employers. Optional fields have been added for employee e-mail addresses and telephone numbers, as well as foreign passport information if applicable.

Employers should have begun using the newly revised Form I-9 (Rev. 03/08/13)N for all new hires and reverifications. Employers may continue to use previously accepted revisions [(Rev.02/02/09)N and (Rev. 08/07/09)Y] until May 7, 2013. After May 7, 2013, employers must only use the I-9 version with the revision date of (Rev. 03/08/13)N. The revision date of the I-9 is printed on the lower left corner of the form.

USCIS noted that employers should not complete a new I-9 for current employees if a properly completed I-9 is already on file.

A Spanish version of the revised I-9 is available on the USCIS website for use in Puerto Rico only. Spanish-speaking employers and employees in the 50 states; Washington, DC; and other U.S. territories may use the Spanish version for reference but must complete the English version of the form.

USCIS is holding numerous upcoming webinars on the I-9 form. See the full list *here*.

The revised form is available in English and Spanish. The Department of Homeland Security published a notice in the Federal Register about the revised I-9. The USCIS announcement is available *here*.

The Federal Register notice is available *here*.

USCIS also released a new M274 Handbook for Employers. It has a revision date of 3-8-13 and is available *here*.

2. No Wages Due If H-1B Employee Is Voluntarily Nonproductive, ALJ Finds

The Department of Labor's Office of Administrative Law Judges recently found that North Shore School for the Arts (NSSA) did not owe an H-1B nonimmigrant employee back pay for voluntarily nonproductive "work" time. NSSA had employed Natsuko Imai as a piano/music teacher for 20 hours per week at a wage rate of $40 per hour.

Among other things, an NSSA representative stated that Ms. Imai took some students into her own private studio rather than continuing to work with them as NSSA students, which was against NSSA policy. The representative also stated that Ms. Imai was uncooperative in working to get more students. The representative made suggestions for doing so that Ms. Imai rejected. Despite claims to the contrary, Ms. Imai was trying to get into graduate school and spent much of her time practicing piano rather than teaching or performing related outreach duties.

Administrative Law Judge (ALJ) Stephen M. Reilly noted that wages are to be paid for nonproductive time if the employee is "ready, willing, and able" to work and the nonproductive time resulted from a decision of the employer. He found Ms. Imai's testimony "rife with evasiveness, equivocation and forgetfulness." He said that her demeanor during testimony "raised questions regarding her truthfulness." He also found her disregard of the law "troubling" because she admitted to working while on an F-1 student visa and also to working outside NSSA while she was in H-1B status, which are violations. She further admitted that she did not report income for tax purposes. She said she knew these actions were against the law when she did them. ALJ Reilly gave her testimony "little weight" because of these factors and her evasive answers. For example, the ALJ noted that she said that obtaining a doctoral degree was not her plan, but acknowledged that she had applied to doctoral programs and sought and obtained several recommendations for that purpose.

ALJ Reilly also noted that although Ms. Imai spent long hours at the school, her focus was on practicing the piano, not teaching or performing her job duties. He found that Ms. Imai did not make herself available to perform her job duties and thus was not ready, willing, and able to work. The ALJ did not hold the NSSA's representative blameless either, stating that she was "blinded to reality." ALJ Reilly found the employer responsible for back pay for work performed (74.5 hours plus interest, for a total of $2,980), but not for the hours in dispute during which Ms. Imai was not performing work.

The case is available *here*.

Seyfarth Immigration Events and News

Seyfarth Immigration Attorneys' Recent Media Exposure

Dyann DelVecchio was quoted in an April 5 Law360 article discussing the new I-9 form that employers must begin using in May, in order to verify a new hire's employment eligibility to work in the U.S. Dyann commented that the I-9 form continues to cause headaches for many employers, and the new form provides, "the perfect opportunity to refresh staff as to the basic building blocks of the I-9."

See the article *here*.

Angelo Paparelli was interviewed and featured on the April 23 Southern California Public Radio program, "Take Two," on the proposed comprehensive immigration reform bill currently sitting in the Senate. During the thought-provoking, four-minute feature, Angelo provides background on the path to citizenship and discusses some of the major changes to expect in reducing processing delays should the bill pass.

Tune in at the 1:13 mark to hear Angelo answer the question that many immigrants ask: "why does it take so long?"

See the interview *here*.

In addition, Angelo Paparelli has posted several new blog entries on his *Nation of Immigrators* public policy blog:

The Xenophobes Can't Kill Immigration Reform - But What Should CIR Supporters Do Now?
The tragic events from Boston gave a forum for the usual xenophobic suspects to make their tired excuses against immigration reform. Fortunately, Comprehensive Immigration Reform proponents on both sides of the aisle in Congress and elsewhere immediately countered the anti-immigrant noise. Angelo provides a six-point plan to ensure that CIR does not get derailed.

Arcing toward Immigration Justice: "Illegals" No More
Martin Luther King, Jr. reminded all, "the arc of the moral universe is long, but it bends toward justice." Two recent events recall the prescient words of Dr. King. First U.S. Immigration and Customs Enforcement (ICE) agreed to pay $1 million in settlement to a group of plaintiffs for early-morning home raids that terrorized their children.

In addition, in an advancement that shows enlightenment more than just semantics, the Associated Press announced that it would no longer include the term, "illegal immigrant," in its authoritative Stylebook -- the journalist's bible. According to the AP's Senior VP and Executive Editor Kathleen Carroll, "It's kind of a lazy device that those of us who type for a living can become overly reliant on as a shortcut . . . It ends up pigeonholing people . . . where you use some main event in someone's life to become the modifier before their name.".

Oh What a Tangled Immigration Web We Weave: A Knotty Future For the H-2B Program
The H-2B visa has become everyone's punching bag -- from the courts, to Congress, to the administrative agencies that implement our immigration laws, not to mention organized labor and business interests. Angelo updates a guest blog post from a former government official and immigration policymaker who wishes to remain anonymous. Angelo and his guest blogger provide thoughtful commentary on a work visa program gone horribly awry.

By: *Angelo A. Paparelli, Gabriel Mozes* and *John Quill*

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