SEYFARTH ATTORNEYS SHAW LLP

Immigration Inbox: News You Can Use

U.S. Immigration:

1. H-1B Cap Reached for FY 2012 - Petitions for new employment of an H-1B will not be accepted again until April 1, 2012.

2. House Votes To End Per-Country Limits on Employment-Based Immigration Visas - The measure, which could benefit skilled Indian and Chinese workers and high-tech companies in the United States, is stalled in the Senate because of a hold by Sen. Charles Grassley.

3. Labor Dept. Current on PERM, H-1B Prevailing Wage Determinations – In the PERM and H-1B programs, the Labor Department considers a prevailing wage determination “current” if it is issued within 60 days of submission.

4. State Dept. Releases Fact Sheet on Growing Demand for Visas; Greatest Increase From China, Brazil – During the past five years, visa issuances have increased 234 percent in Brazil, 124 percent in China, 51 percent in India, and 24 percent in Mexico.

5. Employers May Bundle L-1 Filings, USCIS Announces – USCIS will consider multiple applications grouped into “bundles” of L-1 petitions as part of an effort to streamline and improve the adjudication process.

6. Student and Exchange Visitor Update: F, M, J Visa Processing Resumes Worldwide; Expedited Processing, Record Numbers of Students Announced – International students attending U.S. colleges and universities rose to a record number in the 2010-2011 academic year.

7. State Dept. Seeks Comments on New Exchange Visitor Summer Work Travel Verification Form – The form will be completed by designated program sponsors, and one is required for each summer work travel participant.

8. DOL Releases New PERM FAQ on Listing Job Duties Not Normal to Occupation; Discusses Updates to Job Codes – DOL has posted a revised FAQ sheet regarding the PERM labor certification program and listing job requirements not normal to the occupation; the agency also said it is working to incorporate new job codes into the online application system known as Standard Occupational Classifications (SOC).

9. USCIS Issues Draft EB-5 Memo – USCIS seeks stakeholder input on “foundational issues” before providing greater detail.

10. State Dept. Announces Progress on ‘Historic’ Visa Agreement With Russia – The visa agreement has advanced one step closer to entry into force.

11. Justice Dept. Sues Utah Over Immigration Law – DOJ argued that Utah’s law is unconstitutional and mandates immigration enforcement measures that interfere with the immigration priorities and practices of the federal government.

Seyfarth Work Authorization Team (SWATeam):

1. Labor Dept. Inspector General Identifies 'Integrity of Foreign Labor Certification Programs' as a Top Management Challenge – The OIG said that investigations "continue to uncover schemes carried out by immigration attorneys, labor brokers, and transnational organized crime groups."

2. OSC Releases Info on Enforcement, Policy, Trends; Launches Webinar – OSC said its enforcement work has been bolstered by a rise in referrals of potential discrimination from entities such as the Department of Labor, legal aid bureaus, and immigrant advocacy organizations.

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Recent News from Seyfarth's Immigration Attorneys

U.S. Immigration

1. H-1B Cap Reached for FY 2012

As discussed in our November 2011 newsletter, U.S. Citizenship and Immigration Services (USCIS) announced that it has received a sufficient number of H-1B petitions to reach the statutory numerical limit (cap) of 65,000 for fiscal year (FY) 2012. November 22, 2011, was the final receipt date for new H-1B petitions requesting an employment start date in FY 2012. USCIS further announced that all petitions received on November 22, 2011 will be adjudicated under the FY 2012 cap. Unlike previous years, there will not be a lottery to select a limited number of petitions filed on the last day of filing.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. In addition, petitions filed on behalf of current H-1B workers who have been counted previously against the cap will not be counted toward the FY 2012 H-1B cap. Accordingly, USCIS will continue to accept and 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; and
- allow current H-1B workers to work concurrently in a second H-1B position.

Petitions for "new employment" of an H-1B, that is, for employment of a person who is not yet in H-1B status for another employer, will not be accepted again until April 1, 2012. Those petitions received after April 1, 2012, must request employment starting October 1, 2012, so that they will be subject to next year's cap (FY 2013).

2. House Votes To End Per-Country Limits on Employment-Based Immigration Visas

On November 29, 2011, the U.S. House of Representatives voted 389-15 in favor of ending per-country numerical limits (caps) on employment-based visas. The bill does not raise the number of such visas issued, but would eliminate the current provision stating that employment-based visas issued cannot exceed seven percent of the total for any one country. The measure could benefit skilled Indian and Chinese workers and high-tech companies in the United States.

Similar legislation is pending in the Senate. For the text of the bill, H.R. 3012, click here.

3. Labor Dept. Current on PERM, H-1B Prevailing Wage Determinations

The Department of Labor's Office of Foreign Labor Certification recently announced that PERM and H-1B prevailing wage determinations are now current. H-2B prevailing wage determinations are expected to become current imminently.

The Department explained that "current" has a different meaning depending on the program. In the PERM and H-1B programs, a prevailing wage determination is considered current when it is issued within 60 days of submission. For H-2B prevailing wage determinations, "current" is within 30 days of submission. The PERM program became current the week of October 23, 2011, and the H-1B program became current the week of November 6, 2011. The Department noted that the dates may be subject to change based on unanticipated actions, such as any additional judicial determinations or legislative actions. The agency added that appeals are being processed as resources allow, with priority placed on becoming current on initial prevailing wage determination requests.

The notice is available under "November 17, 2011," *here*.

4. State Dept. Releases Fact Sheet on Growing Demand for Visas; Greatest Increase From China, Brazil

In a fact sheet released on October 24, 2011, the Department of State said that demand for U.S. visas is growing, and that the agency is "committed to increasing visa adjudications by one-third in FY 2012 in both China and Brazil, two countries where we have seen the greatest increase in visa demand." During the past five years, visa issuances have increased 234 percent in Brazil, 124 percent in China, 51 percent in India, and 24 percent in Mexico. In fiscal year 2011, consular officers processed more than one million visas in China, an increase of more than 35 percent over last year.

At the busiest U.S. consular posts, officers may interview more than 100 visa applicants per day. Preliminary numbers indicate that consular officers processed more than 9.6 million visa applications in FY 2011. Of those, the Department issued more than 7.5 million U.S. visas, an increase of more than 17 percent over the previous fiscal year, during which 6.4 million visas were issued. During the past five years, visa issuances have increased 234 percent in Brazil, 124 percent in China, 51 percent in India, and 24 percent in Mexico. In fiscal year 2011, consular officers processed more than one million visas in China, an increase of more than 35 percent over last year.

The Department of State noted that according to Department of Commerce figures, 60 million visitors entered the United States in 2010, and 35 percent of those visitors entered using visas issued by the Department of State. International travel to the United States generated $134 billion in revenue and supported 1.1 million U.S. jobs in 2010, the Department of Commerce reported. The Department of Commerce estimated that the number of potential visitors to the United States will increase six to nine percent annually for the next five years, and could reach 88 million visitors by 2016.

The Department of State said it is adding 98 visa adjudicators this year and next in China and Brazil. A number of these new adjudicators are being hired through a pilot program that targets applicants who already speak Mandarin or Portuguese. The Department expects the first group of these special hires to arrive at posts in China and Brazil in spring 2012. A second group will follow in summer 2012.

Some posts in China and Brazil are operating with extended hours to maximize use of existing facilities. Working bilaterally with host governments, the Department of State is also working to expand and improve visa processing facilities to allow for more applicant interviews.

Wait times for visa appointments can fluctuate significantly depending on seasonal demand, the Department of State noted, adding that "[a]t most posts around the world, visa applicants wait less than one week for an interview appointment. We will continue to send temporary duty officers to manage seasonal spikes in demand."

Wait times for student visa interview appointments worldwide are less than 15 days, the Department said. Student visa appointments are prioritized "because of the tremendous intellectual, social, and economic benefits foreign students provide to the U.S. economy." Department of Commerce figures show that international students contributed nearly $20 billion to the U.S. economy during the 2009-2010 academic year, the Department of State noted.

The Department of State said that U.S. embassies and consulates have established procedures to expedite interview appointments for urgent business travel. "U.S. officials work closely with American Chambers of Commerce in more than 100 countries to streamline the visa process for business travelers," the fact sheet states.

The Department said its Business Visa Center facilitates visa application procedures for U.S. companies and convention organizers who invite employees or current and prospective business clients to the United States. The Center handled nearly 3,500 requests in FY 2011. U.S.-based businesses may e-mail *businessvisa@state.gov* or call 202-663-3198 for more information.

The fact sheet, "State Department Supports Global Travel Growth," is available *here*.

5. Employers May Bundle L-1 Filings, USCIS Announces

U.S. Citizenship and Immigration Services (USCIS) recently said it recognizes that businesses may need to temporarily move multiple employees to the United States for particular projects that require the employees' specialized knowledge. To do this, USCIS said that employers may petition for their employees to obtain L-1 nonimmigrant classification by filing Form I-129, Petition for a Nonimmigrant Worker. While each L-1 petition must be considered on its own merits, USCIS will consider multiple applications grouped into "bundles" of L-1 petitions as part of an effort to streamline and improve the adjudication process.

For USCIS to consider the bundle, all included L-1B petitions must be related to employees on the same project, who will work at the same location, and who have the same specialized knowledge duties.

USCIS will also consider petitions for L-1A managers included with the bundle, if they will be managing the L-1B beneficiaries who will be working on the project. In addition, USCIS will consider Forms I-539, Application to Extend/Change Nonimmigrant Status, filed for a beneficiary's qualifying dependents included in the bundle. The agency also offered filing tips for bundling L-1 petitions. The information is available here.

Seyfarth recommends that employers carefully consider whether bundling of L-1 cases is advisable based on the circumstances involved, and seek guidance from immigration counsel. Bundling could lead to unforeseen difficulties if the government perceives an obstacle to eligibility and then issues burdensome Requests for Additional Evidence or Notices of Denial for all cases in the bundle.

6. Student and Exchange Visitor Update: F, M, J Visa Processing Resumes Worldwide; Expedited Processing, Record Numbers of Students Announced

The Department of State recently identified difficulties with its Consolidated Consular Database (CCD) communications with the Student and Exchange Visitor Program's (SEVP) Student and Exchange Visitor Information System. The Department discovered this issue on November 14, 2011, and subsequently instructed embassies and consulates worldwide to halt, temporarily, the issuance of all F, M and J visas. SEVP and the Department subsequently resolved the difficulties as of November 18, 2011, and the Department instructed embassies and consulate to resume issuing F, M, and J visas immediately.

Separately, the Department of State announced in conjunction with International Education Week on November 14, 2011, that "[a]ll U.S. embassies and consulates expedite visa processing for foreign students to ensure qualified students are able to begin their academic program on time." Worldwide, the maximum wait for a student visa appointment is now fewer than 15 days, the Department said. Foreign students may apply for their visas up to 120 days before their academic programs begin. The Department encourages all visa applicants to apply early.

According to the Institute of International Education (IIE), international students attending U.S. colleges and universities rose to a record 723,277 in the 2010-2011 academic year. The five percent rise over the previous academic year was fueled by a sharp increase in the number of Chinese students coming to the United States. Chinese students increased by 23 percent altogether and by 43 percent at the undergraduate level. IIE reported that Chinese student enrollment rose to a total of nearly 158,000 students, or nearly 22 percent of the total international student population in the United States, making China the leading sending country for the second year in a row. Students from India, the second largest international cohort in the United States, decreased by one percent to a total of nearly 104,000, IIE said. IIE noted Department of Commerce statistics showing that international students contribute more than $21 billion to the U.S. economy through tuition and living

expenditures.

For the tenth year in a row, the University of Southern California is the leading host institution, with 8,615 international students in academic year 2010/11, IIE reported. University of Illinois at Urbana-Champaign hosts the second highest number of foreign students (7,991), with New York University a close #3 (7,988). California remains the leading host state for international students (96,535, up 2 percent), followed by New York (78,888, up 4 percent), and Texas (61,636, up 5 percent).

The notice announcing resumption of F, M, and J issuances is available *here*.

The notice announcing expedited student visa processing is available *here*.

The notice announcing the IIE statistics and trends on international students is available *here*.

7. State Dept. Seeks Comments on New Exchange Visitor Summer Work Travel Verification

The Department of State's Bureau of Educational and Cultural Affairs, which administers the exchange visitor (J visa) program, seeks comments on a new Summer Work Travel Job Placement Verification Form.

The form will be completed by designated program sponsors, and one is required for each summer work travel participant. It will include the employer, address of the employment site, job duties, whether the participant will receive any remuneration for housing and living expenses (and, if so, the amount), and estimates of the living expenses and other costs the participants are likely to incur while in the United States. The form must be signed by the participant, the sponsor, and the third party employer, if a third party organization is used in conducting the summer work travel program. The form will be submitted to the Department by mail or fax as requested during the review of program sponsor files, redesignations, or incidents. Upon request, summer work travel applicants also must present a fully executed Job Placement Verification Form (DS-7007) to any consular official interviewing them in connection with the issuance of a J-1 visa.

The Department seeks public comments to help the agency:

- evaluate whether the proposed information collection is necessary for the effective administration of the summer work travel category of the exchange visitor program;
- evaluate the accuracy of its estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected on the form; and
- minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

The Department estimates that approximately 51 respondents (entities designated by the Department as exchange visitor program sponsors in the Summer Work Travel category, and U.S. businesses that provide the employment opportunity) will take about an hour each to complete the form.

Comments will be accepted up to 60 days after November 28, 2011. The notice, which includes details about where to submit comments, is available *here*.

8. DOL Releases New PERM FAQ on Listing Job Duties Not Normal to Occupation; Discusses Updates to Job Codes

The Department of Labor has posted a revised frequently asked questions (FAQ) sheet regarding the PERM program and listing job requirements not normal to the occupation on both the ETA Form 9141, Prevailing Wage Request, and the ETA Form 9089.

The brief FAQ states:

Does informing the National Prevailing Wage Center (NPWC) on a prevailing wage request (ETA Form 9141) that the job contains requirements not normal to the occupation meet an employer's obligation to inform the Department of Labor (Department) of these requirements on the Application for Permanent Employment Certification (ETA Form 9089)?

No. Even if the employer has informed the NPWC of these requirements in a prevailing wage request (ETA Form 9141), the employer must still accurately outline its requirements on Questions H.12 or H.13 of the Application for Permanent Employment Certification (ETA Form 9089).

The Department also said it is working to incorporate new and/or revised Standard Occupational Classification (SOC) codes into the PERM online application system. Until the new codes are fully integrated, they may not be available in the online system and the Atlanta National Processing Center will accept the older SOC codes even though they may not match the code indicated on the prevailing wage determination. The Office of Foreign Labor Certification suggested that filers "may also consider placing the new SOC job title in section H.3, and the new SOC code in section H.14 of the ETA Form 9089."

The PERM FAQ, which replaces the previous notice that referred to the State Workforce Agency (SWA), is available *here*.

The announcement about SOC codes is available *here*.

9. USCIS Issues Draft EB-5 Memo

U.S. Citizenship and Immigration Services (USCIS) recently released a draft memorandum to address "certain foundational issues" in the EB-5 immigrant investor program. USCIS seeks stakeholder input on these foundational issues before providing greater detail and addressing additional issues.

On a conference call held on November 9, 2011, to discuss the draft memo, Mr. Mayorkas said that it differs from other policy memos in that it gives adjudicators the context of the EB-5 program: that it is important because it creates jobs for U.S. workers. Mr. Mayorkas said that this context should guide adjudicators.

The memo also lays out the preponderance of evidence standard: "[T]he petitioner must establish each element by a preponderance of the evidence. That means that the petitioner must prove to us that what he or she claims is more likely so than not so. This is a lower standard of proof than the standard of 'clear and convincing,' and even lower than the standard 'beyond a reasonable doubt' that applies only to criminal cases. The petitioner does not need to remove all doubt from our adjudication, but must instead show that what he or she presents is more probable than not."

In general, the memo will only take effect when USCIS finalizes it. However, effective immediately, USCIS generally will defer to a state's targeted employment area (TEA) designation. The memo notes: "USCIS is to give deference to the state's designation of the boundaries of the geographic or political subdivision that will be the targeted employment area." It adds, however, that "USCIS must ensure compliance with the statutory requirement that the proposed area has an unemployment rate of at least 150 percent of the national average rate. For this purpose, USCIS will review state determinations of the unemployment rate and, in doing so, USCIS can assess the method or methods by which the state authority obtained the unemployment statistics."

The memo also clarifies that while the immigrant's investment must result in the creation of jobs for qualifying employees, it is the new commercial enterprise that creates the jobs. An investor's money that goes into a new commercial enterprise can be used in a variety of ways, including bridge financing, hiring personnel, or operating the company.

USCIS Director Alejandro Mayorkas said the draft memorandum is a "work in progress," and that the agency is sharing it now "to obtain valuable real-time input and to define a collaborative approach with the stakeholder community." He noted that the draft memorandum "is not operative and will not guide adjudication decisions until it is published in complete and final form. Current policy memoranda continue to guide our adjudications." Mr. Mayorkas said that USCIS plans to consolidate all existing EB-5 memos into one. A second draft will incorporate comments received from stakeholders and add details from other existing EB-5 memos.

An opportunity to comment will be available after the second draft is released, which will likely happen within approximately two months.

The draft memo and a statement from Mr. Mayorkas are available *here*.

The draft memo and a statement from Mr. Mayorkas are available *here*.

10. State Dept. Announces Progress on 'Historic' Visa Agreement With Russia

Secretary of State Clinton and Russian Foreign Minister Lavrov exchanged diplomatic notes during their November 19, 2011, meeting in Bali on the new agreement on visas announced on July 13, 2011. The exchange of notes advances the visa agreement one step closer to entry into force. Under Russian law, the Duma must next ratify the agreement. Following ratification, the parties will exchange a second set of notes confirming that their internal procedures for entry into force have been completed. The agreement will come into force 30 days after that exchange.

The Department called the visa agreement "historic." It will allow tourists and business travelers from the United States and Russia to receive visas with longer validity periods of 36 months, and for multiple entries.

11. Justice Dept. Sues Utah Over Immigration Law

On November 22, 2011, the Department of Justice and several other agencies filed suit against Utah's new immigration-related law, after similar recent lawsuits against Arizona, Alabama, and South Carolina's laws.

In a complaint filed in the District of Utah, the Department argued that several provisions of Utah's H.B. 497, enacted on March 15, 2011, are preempted by federal law. The Department said its lawsuit comes after several months of "constructive discussions" with Utah state officials and that, notwithstanding the lawsuit, Department officials "expect this important dialogue to continue."

The complaint states that H.B. 497 violates the U.S. Constitution because it attempts to establish state-specific immigration policy. According to a related statement released by the Department, Utah's law "creates and mandates immigration enforcement measures that interfere with the immigration priorities and practices of the federal government in a way which is not cooperative with the primary federal role in this area." Among other things, the Department argues that the law's mandates on law enforcement "could lead to harassment and detention of foreign visitors and legal immigrants who are in the process of having their immigration status reviewed in federal proceedings and whom the federal government has permitted to stay in this country while such proceedings are pending."

"A patchwork of immigration laws is not the answer and will only create further problems in our immigration system," said Attorney General Eric Holder. "The federal government is the chief enforcer of immigration laws and while we appreciate cooperation from states, which remains important, it is clearly unconstitutional for a state to set its own immigration policy. We will continue to monitor and coordinate with our federal partners as we remain concerned about the potential impact of these state laws."

Department of Homeland Security Secretary Janet Napolitano said legislation such as Utah's new law "diverts critical law enforcement resources from the most serious threats to public safety and undermines the vital trust between local jurisdictions and the communities they serve. The Department will continue to enforce federal immigration laws in Utah in smart, effective ways that focus our resources on criminal aliens, recent border crossers, repeat and egregious immigration law violators and employers who knowingly hire illegal labor."

The Department recently notified Utah state officials of its position that Utah's "Immigrant Guest Worker" statutes, H.B. 116 and H.B. 469, are preempted by federal law. Given that the provisions do not take effect until 2013, and "in light of the constructive conversations the department continues to have with Utah officials about these provisions pursuant to the Justice Department's long-standing policy of exploring resolution short of litigation before filing suit against a state," the Department said it is not challenging these provisions now. If Utah fails to comply with federal law in this area, however, "the department will not hesitate to take the legal action necessary to vindicate the important federal interests in this matter before these laws go into effect."

The suit was filed on behalf of the Departments of Justice, Homeland Security, and State, which share responsibilities in administering federal immigration law. The federal government will soon request a preliminary injunction to enjoin enforcement of certain provisions of H.B. 497. Utah's Republican state Rep. Stephen Sandstrom, who sponsored H.B. 497, said he was disappointed, but Utah's Attorney General Mark Shurtleff acknowledged that the focus only on an enforcement

measure rather than also including the guest worker provisions in the suit demonstrated the Department's willingness to continue dialogue. "We're now adversaries in the courtroom but we're going to continue to discuss this with them," he said.

The Justice Department previously challenged Arizona's S.B. 1070, Alabama's H.B. 56, and South Carolina's Act No. 69 on federal preemption grounds. The agency said it continues to review immigration-related laws that were passed in Indiana and Georgia. Courts have upheld some provisions but enjoined others and have temporarily restrained enforcement of Utah's law pending a hearing scheduled for December 2, 2011.

The Department's statement is available *here.*

Seyfarth Work Authorization Team

1. Labor Dept. Inspector General Identifies 'Integrity of Foreign Labor Certification Programs' as a Top Management Challenge

The Department of Labor's Office of the Inspector General (OIG) has identified maintaining the integrity of foreign labor certification programs among the "most serious management and performance challenges facing the Department."

The OIG said that investigations "continue to uncover schemes carried out by immigration attorneys, labor brokers, and transnational organized crime groups." OIG investigations have repeatedly revealed "fraudulent applications filed with DOL on behalf of fictitious companies, as well as schemes wherein fraudulent applications were filed using the names of legitimate companies without the companies' knowledge." Additionally, OIG investigations have uncovered complex schemes involving fraudulent labor certification documents filed in conjunction with or in support of similarly falsified identification documents required by other federal and state organizations, the OIG said.

The OIG noted that the Employment and Training Administration (ETA), which administers the programs, faces challenges in maintaining the integrity of its H-1B and H-2B labor certification programs. The H-1B challenges include statutory limits on the ETA's authority, making system improvements in H-1B labor condition application processing system to better identify incomplete and/or inaccurate applications, and uncertainty about the process for including individuals or entities debarred under the Department's labor certification programs on the government-wide excluded parties lists.

Present H-2B worker protections are based on a model where employers merely assert, but do not demonstrate, that they have performed an adequate test of the U.S. labor market before hiring foreign workers in lieu of U.S. workers, the OIG said. An OIG report issued in October 2011 found that Department regulations had hampered ETA's ability to provide adequate protections for U.S. workers in the H-2B applications filed by four Oregon forestry employers. Although the employers contacted 187 U.S. workers regarding possible employment, none were hired. Instead, 323 foreign workers were brought into the United States for these jobs. The OIG also found that certain state workforce agencies did not fulfill their responsibilities with respect to H-2B applications the OIG reviewed.

The OIG also found that ETA could improve its initial application reviews, post-adjudication processes, and monitoring activities to better protect the interests of U.S. workers. Also, the OIG noted that the state workforce agencies it reviewed were not transmitting posted job orders to other states or referring U.S. workers to employers as required.

The OIG said that ETA's Fraud Detection and Prevention Unit continues to work closely with the OIG to identify and reduce fraud in the labor certification process by reviewing applications for inconsistencies, errors, and omissions. ETA has revised the rule for determining prevailing wage rates and proposed new rules governing the H-2B process. The OIG noted the major features of the new proposed rules, including creating a national electronic job registry for all H-2B job orders; increasing the amount of time for which U.S. workers must be recruited; requiring employers to engage in post-filing recruitment of U.S. workers; creating an H-2B registration process in which employers must demonstrate temporary need before applying for labor certification; reinstating the critical role of the state workforce agencies in assisting employers by using their expertise on local labor market conditions and recruitment patterns; and strengthening debarment authorities by providing the Wage and Hour Division with independent debarment authorities and providing revocation authority to ETA.

To address the H-1B challenges, ETA has entered into a contract with a third-party vendor for employer verification services, the OIG noted. Through this service, ETA is expected to have access to a more comprehensive employer identification database and verification system. This service will be applied to all labor certifications, the OIG said.

In addition, ETA is working with the Department's Chief Acquisition Officer on ways to include foreign labor certification suspensions and debarments on the government-wide excluded parties list.

Finally, ETA is piloting a new risk management model in its permanent labor certification program (PERM). According to ETA, this new risk management model allows ETA to assign risk ratings to applicants and spend an appropriate amount of time reviewing the higher-risk applications, reducing overall reviewing time frames. ETA officials also told the OIG that the new model will eventually be applied to the rest of the foreign labor certification programs.

The OIG said the Department needs to reexamine its certification processes and results to assess effectiveness. Also, the Department needs to enhance its monitoring of the H-2B application process to ensure that state workforce agencies and employers are fully complying with program requirements and intentions and make adjustments to enhance the integrity of its employer verification services by fully implementing electronic employer verification controls to the H-1B program and the remaining foreign labor certification programs. The OIG said that the Department should ensure that it considers suspensions and debarments, and documents decisions, for any entity convicted of violations. It also should ensure that such debarments are reported to appropriate Department personnel for inclusion in the government-wide exclusion system.

The OIG's list of challenges, which includes explanations of why each entry made the list, is available *here*.

2. OSC Releases Info on Enforcement, Policy, Trends; Launches Webinar

November 6, 2011, marked the 25th anniversary of the passage of the Immigration Reform and Control Act, which created the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). To mark the occasion, OSC issued a commemorative newsletter featuring OSC's enforcement, policy, and outreach trends and antidiscrimination efforts. Among other things, the newsletter notes that in 2011, OSC collected over $735,000 in civil penalties from employers. Fiscal year 2011 included OSC's largest civil penalty amount to date, $290,400.

OSC said its enforcement work has been bolstered by a rise in referrals of potential discrimination from entities such as the U.S. Department of Labor (DOL), legal aid bureaus, and immigrant advocacy organizations. For example, OSC has received a number of referrals from DOL regarding agricultural employers believed to have a preference for hiring H-2A visa holders over domestic workers. Recently, OSC has renewed its dialogue with the Equal Employment Opportunity Commission and with DOL's Office of Federal Contract Compliance Programs to ensure that appropriate referrals are made in a timely fashion. It has also initiated discussions with DOL's Wage and Hour Division to identify appropriate cross-agency referrals.

OSC noted that its settlement agreements now routinely include back pay for identified economic victims along with training and monitoring. OSC has also pursued a rising number of pattern or practice claims, including claims involving citizenship status discrimination and "document abuse" (discriminatory employment eligibility verification practices). OSC's recent settlements have involved the healthcare field and institutions of higher education more often than in the past.

Recognizing the need for closer interagency collaboration, on March 17, 2010, OSC and U.S. Citizenship and Immigration Services signed a Memorandum of Agreement providing for enhanced information-sharing and case referrals regarding the misuse, abuse, or fraudulent use of E-Verify and allegations of E-Verify-related employment discrimination. Through this information-sharing agreement, OSC has obtained E-Verify transactional data to investigate allegations of discrimination in the use of E-Verify.

In December, OSC will launch a webinar series on the antidiscrimination provisions of the Immigration and Nationality Act. See OSC's webinar page, *here*, to sign up for a webinar directed at workers or employers, or to suggest a topic for a future webinar. E-mail *terence.j.scott@usdoj.gov* to arrange a webinar at another time for your organization.

Recent News from Seyfarth's Immigration Attorneys

Seyfarth Shaw's Pro Bono efforts were featured in a December 15 Associated Press video and a December 16 Los Angeles Times article, available *here*. The article features Seyfarth attorneys Angelo Paparelli and Elizabeth Wheeler, whose efforts resulted in the granting of United States citizenship to an Egyptian woman who was smuggled into the United States and forced into slavery at age 10. An Associated Press video on the story is available *here*.

Jim Curtis of our Chicago office presented a webinar on hot Occupational Safety and Health Administration (OSHA) issues faced by the hospitality industry on November 3. The presentation discussed enforcement trends as well as policies and practices that may expose businesses to risks that may be avoided.

Minh Vu of our Washington, D.C. office, on November 30, gave an in-depth look at the ADA's new requirements recreational facilities and service animals. The webinar covered how the requirements impact employers' lodging facilities and operations.

Jack Toner of our Washington, D.C. office and *Ronald Kramer*, *Molly Eastman* and *Isabel Lazar* of our Chicago office will be presenting a webinar titled "The Year That Was And Will Be: National Labor Relations Board Update For Hospitality Employers" on January 18, 2012 at 1:00 PM ET. The webinar will cover the National Labor Relations Board's big year, both in terms of its rulemaking initiatives and key decisions impacting hospitality employers. Please email events@seyfarth.com if you would like to attend.

Recent and Upcoming Seminars:

- *Gabriel Mozes presented at the Massachusetts Continuing Legal Education's annual BasicsPlus seminar in Boston on December 12, 2011, on the topic, "NAFTA TN Classification for Canadians and Mexicans."*

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

"Telling Immigration Stories: It's Not Just about Code Sections"

"The Immigration Appeaser-in-Chief Should Try Some New Ammunition"

"Immigration Governance Unmasked"

"Immigration Magnetized, Privatized and Depersonalized"

By: Angelo Paparelli, Gabriel Mozes, and John Quill

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