



## UPDATE ON DEVELOPMENTS IN IMMIGRATION LAW AND PROCEDURE

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Dear Client:

The following is an update on developments in immigration law and procedure.

### **H-1B Cap Still Not Reached - But Stricter Standards Being Applied**

How times have changed. More than two months into the H-1B cap filing period and still more than 20,000 H-1Bs remain to be awarded of the available 65,000 "cap". For several years, these ran out the first filing day. Clearly the economic downturn has effected demand. But this does provide an opportunity for companies to sponsor foreign workers that can help stimulate the economy through their unique job skills. Remember that applications filed now for H-1B jobs will not take effect until October 1, 2009, if subject to the cap.

The Immigration Service has taken the opportunity of fewer H-1B filings to scrutinize those filings even more closely. As some of our clients know, we are receiving extensive requests for evidence on some cases - even though we thoroughly document the cases as always. It has been frustrating to see one employee receive an H-1B with no questions asked and another in the same job receive a big request for evidence. But this is another example of the unpredictability of administrative law.

### **H-1B Investigations**

Another new trend, which according to the Immigration Service will become more common, is the in-person investigation of H-1B applications. Because of the increasing emphasis on fraud in all government programs (and especially the H-1B program), we have seen CIS officers come to the employer's work site to question employees and obtain company records. Iowa is on the leading edge of this trend because of an alleged scheme of H-1B fraud in the IT industry here.

If you receive a personal visit from CIS, here are some things to remember:

- These are CIS investigations, not ICE (or at least they have not been), and therefore are primarily fact-finding.

- You may (politely) refuse to answer questions until your attorney is present. For example: "We of course want to cooperate with you fully, but we would really like to have our attorney here, so can you please wait in the lobby until she arrives?"

- You can call us at any time to assist. These inspections will likely occur during business hours, but feel free to call outside of business hours (cell numbers: 480-7115 - Lori, 554-7280- Amy, and 991-2783 - Nikki). If we are too far away, we can find someone to attend the interview, or find some other way to handle this.

- Neither you nor your employee/prospective employee has done anything wrong by filing for an H-1B. It is unnerving to have this experience, but it does not mean that the application will be denied.

- Employers should keep in mind obligations they may have regarding employee privacy. If you have questions about employee privacy, we have experts at the firm who would be happy to answer them. If you have concerns about releasing information requested, you can tell CIS that you need to check with counsel before releasing potentially restricted information.

### **Immigrant Visa Numbers Expected to Stall**

The Visa Bulletin for July indicates that the EB2 waiting line stands at January 1, 2000, for India and China (the rest of the countries are current) and EB3 continues to be "unavailable" for all countries. EB1 is "current" for all countries.

However, because of increased demand for religious worker (EB4) and investor (EB5) visas, the Department of State expects that visa numbers will move very slowly in the coming year (the new fiscal year starts October 1) unless the quotas are increased.

Only 140,000 employment-based (EB) visas are available each year in these categories and that includes spouses and children in addition to the sponsored worker. Unused EB4 and EB5 numbers have been available to enhance the other categories in the past, helping general worker visa availability.

The EB1 category is for multinational managers and executives, outstanding professors and researchers, and persons with "extraordinary ability". We are happy to explore this category with anyone who believes that he or she qualifies. Also remember that under "cross-chargeability" provisions, the country of birth of an accompanying spouse (and in very rare cases a parent) can be used instead of the country of the principal applicant if that would help escape a waiting line. Other than these options, the only way for this situation to improve is to change the law.

## **Adjustment of Status Interviews Being Held Despite Backlogs**

Given the backlogs discussed above, the Immigration Service has decided to adjudicate cases to the extent possible to remove deniable cases from the waiting line and to have approvable cases available to be finalized when the visa numbers progress.

Many applicants in the waiting line have received requests for evidence or interview notices. This does not mean your case will be approved if a visa number is not available.

Interviews are scheduled for several reasons: to investigate a past criminal conviction, to evaluate the validity of a recent marriage, or to confirm the legitimacy of a job offer, for example. If we receive the interview notice, we will send a detailed instruction letter and suggest a conference call to discuss how to approach the interview. If you receive an interview notice and have not heard from us, please contact us. Sometimes we do not receive government notices, although we are supposed to if we have a G-28 on file in your case.

## **To EAD or Not to EAD - That is the Question**

Another consequence of the long waiting lines is that employment authorization document (EAD) and advance parole approvals must be renewed several times. The Immigration Service is now approving most EADs in employment-based cases for two years, rather than one year.

Still, people who filed under the "old" rules, must pay a filing fee each time an EAD or advance parole is renewed.

It is true that if you are on H-1B (or L) and continue to work for the H-1B employer (and no other employer without an H-1B approval), you do not need the EAD or advance parole to maintain your status or to travel.

However, please be aware that if the H-1B employment ends, you will need an EAD to work anywhere else (unless the new employer is willing to transfer the H-1B) and an advance parole to travel outside the U.S. These can take 90 days (or sometimes longer), during which waiting time you cannot work or travel outside the U.S. Considering this, EAD and advance parole renewals may be reasonably-priced "insurance".

## **Farewell to Gina Johnson**

We will miss Gina, but wish her well as she moves to Texas to be closer to her family. Thanks to Gina for all she did for our department and the firm!

## **Welcome Back Natalie!**

The only way we can stand to let Gina leave is that Natalie Rivera is returning! Natalie spent several months in El Salvador and fortunately for us was able to return right when Gina was scheduled to leave. Natalie is also fluent in Spanish.

## **Employment Law Seminar Materials Available**

If you missed our firm's annual Employment Law Seminar and would like the materials, they are available in pdf format. Just let us know and we'll send them to you.

Lori Chesser  
Immigration Department Chair