LitwinLaw Update

April 1, 2009

Headlines:

- **1. H-1B Update: FY 2010 Filing Started April 1 and Still Remains Open** - USCIS put in place a five-day window for H-1B filings if the agency receives 65,000 or more applications within the first five business days in April, but 85,000 petitions have not been received.

- **2. H-2A/H-2B: Interpretation of FLSA On Relocation Expenses Withdrawn** - The interpretation said that the FLSA and its implementing regulations do not require employers to reimburse workers under the H-2A and H-2B programs for relocation expenses even when such costs result in the workers being paid less than the minimum wage.

- **3. H-2B Limitations Hurting Maryland Crab Industry** - Approximately 150 Chesapeake Bay-area watermen and representatives of related industries met with Maryland's First District Congressman Frank Kratovil (D-Md.) to discuss the problem.

- **4. EB-5 Immigrant Investor Pilot Program Extended** - The EB-5 Immigrant Investor Pilot Program has been extended through September 30, 2009.

- **5. Illinois E-Verify Statute Overturned** - Illinois cannot "dictate to Congress the standards that federal programs must meet."

- **6. Deferred Enforced Departure Extended for Liberians** - The previous DED grant expired on March 31, 2009; DED has been extended for 12 months.

- **7. Court Rules on Concurrent Filings for Religious Workers** - The U.S. District Court for the Western District of Washington ruled, in *Ruiz-Diaz v. U.S.*, that a USCIS regulation is "unreasonable and impermissible."

- **8. Some Visa Categories Retrogress in April; Cut-Off Dates May Slow** - The employment third preference Other Worker cut-off date has been retrogressed for all countries in order to hold the issuance level within the annual limit.

- **9. New I-9 Form Goes Into Effect** - The new form, which is going into effect April 3, 2009, reflects the Department of Homeland Security's amended regulations.

Also in this issue:

Details...

1. H-1B Update: FY 2010 Filing Starts April 1

U.S. Citizenship and Immigration Services (USCIS) started accepting fiscal year (FY) 2010 H-1B applications on April 1, 2009. In recent years, H-1B numbers have been used up on the first day of the filing period, which has led to more and more applications being filed in a rush. To alleviate difficulties caused by so many H-1B applications being filed on the same day, USCIS put in place a five-day window for FY 2010 H-1B filings if the agency receives 65,000 or more H-1B applications within the first five business days in April, ending April 7, 2009. This date extension was not necessary, since 85,000 were not received in five days.

Exempt from the 65,000 cap are those who: (1) are employed at, or have received offers of employment from, an institution of higher education, or a related or affiliated nonprofit entity; (2) are employed at, or have received offers of employment from, a nonprofit research organization or a governmental research organization; or (3) have earned a master's or higher degree from a U.S. institution of higher education. There is a 20,000 cap on master's degree exemptions.

The following are highlights of recent H-1B developments:

Interim final rule. USCIS issued an interim final rule effective March 24, 2008, governing petitions filed on behalf of workers subject to the annual numerical limitations applicable to the H nonimmigrant classification. This rule provides that USCIS will include petitions filed on all of those first five business days in the random selection process if USCIS receives a sufficient number of petitions to reach the applicable numerical limit (including limits on exemptions) on any one of the five business days on which USCIS may accept petitions. USCIS has determined that a filing period of five business days is sufficient to account for a wider range of mail delivery times offered by the various mail delivery providers available to the public.

This rule also provides that, if both the 65,000 and 20,000 caps are reached within the first five business days available for filing H- 1B petitions for a given fiscal year, USCIS must first conduct the random selection process for petitions subject to the 20,000 cap on master's degree exemptions before it may begin the random selection process of petitions to be counted toward the 65,000 cap. After conducting the random selection for petitions subject to the 20,000 cap, USCIS then must add any non-selected petitions to the pool of petitions subject to the 65,000 cap and conduct the random selection process for this combined group of petitions. Therefore, those petitions that otherwise would be eligible for the master's degree exemption that are not

selected in the first random selection will have another opportunity to be selected for an H-1B number in the second random selection process. This rule also clarifies that those petitions not selected in either random selection will be rejected.

To ensure the fair and equitable distribution of cap numbers, the interim rule also precludes a petitioner (or its authorized representative) from filing, during the course of any fiscal year, more than one H-1B petition on behalf of the same beneficiary if such person is subject to the 65,000 cap or qualifies for the master's degree exemption. USCIS said it recognizes that, on occasion, an employer may extend the same worker two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same person. This rule precludes this practice if the beneficiary is subject to the numerical limitations or qualifies for the master's degree exemption.

In cases where USCIS does not discover that duplicative or multiple petitions were filed until after approving them, the rule also provides that USCIS may revoke all such petitions if they were approved after this rule becomes effective.

The rule does not, however, preclude related employers from filing petitions on behalf of the same worker. USCIS said it recognizes that an employer and one or more related entities (such as a parent, subsidiary, or affiliate) may extend the same worker two or more job offers for distinct positions and therefore have a legitimate business need to file two or more separate H-1B petitions on behalf of the same person.

For example, USCIS noted, a Fortune 500 company may be the parent company of numerous U.S.-based subsidiaries whose business is to engage in either the food, beverage, or snack industries. Each line of business may, in turn, be divided into several business units and operate distinct companies (e.g., restaurant, bottled beverage plant, cereal manufacturer) with different EIN numbers and addresses. Although all the subsidiaries are ultimately related to the parent company through corporate ownership, this rule does not prohibit different subsidiaries from filing one H-1B petition each on behalf of the same worker so long as each employer/subsidiary has a legitimate business need to hire the worker for a position within that subsidiary's corporate structure. Thus, in this example, if the bottled beverage plant owned by the Fortune 500 company and the cereal manufacturing company owned by the same Fortune 500 company are each in need of the services of a Chief Financial Officer, both may file one petition each on behalf of the same worker. A subsidiary should not file an H-1B petition for a worker just to increase the person's chances of being selected for an H-1B number where that subsidiary has no legitimate need to employ

the worker and is, instead, only filing a petition to facilitate the worker's hiring by a different, although related, subsidiary.

The interim final rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-5906.pdf.

USCIS issued a notice about the FY 2010 H-1B cap and filing period at http://www.uscis.gov/files/article/H-1B_Filing_20mar2009.pdf. A related Q&A document is available at http://www.uscis.gov/files/article/H-1B_filing_qa_20mar2009.pdf.

H-1B employers receiving TARP funding. Meanwhile, USCIS has announced additional H-1B requirements for employers receiving Troubled Asset Relief Program (TARP) funding before hiring H-1B specialty occupation workers. The new "Employ American Workers Act" (EAWA), signed into law by President Obama as part of the

American Recovery and Reinvestment Act on February 17, 2009, was enacted to ensure that companies receiving covered funding do not displace U.S. workers. Under this legislation, any company that has received covered funding and seeks to hire new H-1B workers is considered an "H-1B dependent employer." All H-1B dependent employers must make additional attestations to the Department of Labor (DOL) when filing the Labor Condition Application (LCA).

EAWA applies to any LCA and/or H-1B petition filed on or after February 17, 2009, involving any employment by a new employer, including concurrent employment and regardless of whether the beneficiary is already in H-1B status. The EAWA also applies to new hires based on a petition approved before February 17, 2009, if the H-1B employee had not commenced employment before that date.

EAWA does not apply to H-1B petitions seeking to change the status of a beneficiary already working for the employer in another work-authorized category. It also does not apply to H-1B petitions seeking an extension of stay for a current employee with the same employer.

The USCIS notice is available at http://www.uscis.gov/files/article/H-1B_TARP_20mar2009.pdf. USCIS has issued a related Q&A document at http://www.uscis.gov/files/article/H-1B_TARP_qa_20Mar2009.pdf.

Revised Form I-129. USCIS has revised Form I-129, Petition for Nonimmigrant Worker, to include a question asking whether the petitioner has received covered funding. USCIS has posted this form at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f61417

6543f6d1a/?vgnextoid=f56e4154d7b3d010VgnVCM10000048f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD.

While USCIS encourages petitioners, whenever possible, to use the most up-to-date form, the agency said it will not require use of the revised form in time for the start of the filing period for fiscal year 2010. However, USCIS urges H-1B petitions who have already prepared packages for mailing using the previous Form I-129 (January 2009 version) to complete only the page in the revised version of the Form I-129 (March 2009) that has the new question on EAWA attestation requirements and to file this single page with the prepared package. The single page referenced is the first page on the H-1B Data Collection and Filing Fee Exemption Supplement.

USCIS reminds petitioners that a valid LCA must be on file with DOL at the time the H-1B petition is filed with USCIS. This means that if the petitioner indicates on its petition that it is subject to the EAWA, but the LCA does not contain the proper attestations relating to H-1B dependent employers, USCIS will deny the H-1B petition.

Meanwhile, Bank of America withdrew many job offers to MBA students graduating from U.S. business schools because of the H-1B limitation on TARP funding. About a third of MBA students at leading U.S. schools who go into finance and banking jobs come from outside the U.S. David Schmittlein, dean of MIT's Sloan School of Management, worried that "[t]here might be an inclination for people from around the world to vote with their feet."

H-1B success stories. The American Immigration Lawyers Association is collecting examples of the important contributions made by H-1B workers. If you have any such examples, please e-mail them to H-1Bsuccess@aila.org.

Back to Top

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2. H-2A/H-2B: Interpretation of FLSA On Relocation Expenses Withdrawn

Effective March 26, 2009, the Department of Labor (DOL or the Department) withdrew an interpretation of the Fair Labor Standards Act (FLSA) published on December 18 and 19, 2008. The interpretation said that the FLSA and its implementing regulations do not require employers to reimburse workers under the H-2A and H-2B nonimmigrant visa programs, respectively, for relocation expenses even when such costs result in the workers being paid less than the minimum wage. This interpretation was withdrawn for further consideration by the Department and "may not be relied upon as a statement of agency policy."

The notice, which was published in the Federal Register on March 26, 2009, is available at http://edocket.access.gpo.gov/2009/pdf/E9-6623.pdf.

Back to Top

3. H-2B Limitations Hurting Maryland Crab Industry

Many crab processing plants in Dorchester County, Maryland, may stay closed when the crabbing season opens on April 1, 2009, because crab-pickers from Mexico and Central America have been unable to get H-2B visas, according to reports. Approximately 150 Chesapeake Bay-area watermen and representatives of related industries recently met with Maryland's First District Congressman Frank Kratovil (D-Md.) to discuss the problem.

Congressman Kratovil recently sent a letter, along with Senators Barbara Mikulski (D-Md.) and Benjamin Cardin (D-Md.), to the Departments of Labor and Homeland Security, that discussed the H-2B visa shortage's effects on Maryland's crab industry. Congressman Kratovil noted that "[a]llowing bureaucratic delays to [a]ffect an economy that is already hurting would do my constituents and their families an injustice and lead to further American job loss. Through no fault of their own, small businesses will not be able to employ the seasonal employees that they need to survive and prosper. Everything possible must be done to ensure local business have the workers they need to succeed, especially in the current environment." Congressman Kratovil is an original co-sponsor of H.R. 1136, "Save Our Small Seasonal Businesses Act of 2009," which would allow any H-2B temporary worker who came to the U.S. during at least one of the past three years to continue to qualify for temporary admission. The law also proposes a permanent extension of the H-2B program.

Jack Brooks, president of the Chesapeake Bay Seafood Industries Association, cited University of Maryland research that found that every H-2B temporary worker creates two-and-a-half jobs for shore residents.

The text of Rep. Kratovil's letter is available at http://kratovil.house.gov/2009/01/mikulski-cardin-and-kratovil-to-feds-h2b-employers-need-your-help.shtml.

Back to Top

4. EB-5 Immigrant Investor Pilot Program Extended

U.S. Citizenship and Immigration Services (USCIS) announced on March 12, 2009, that the EB-5 Immigrant Investor Pilot Program has been

extended through September 30, 2009, due to the signing of the Fiscal 2009 Omnibus Appropriations Bill.

As a result of the extension of the pilot program, USCIS will continue to receive, process, and adjudicate all Regional Center Proposals and Forms I-526, Immigrant Petitions by Alien Entrepreneur, and Forms I-485, Applications to Register Permanent Residence or Adjust Status, affiliated with Regional Centers relying on "indirect" job creation analysis. Currently, there are 45 Regional Centers throughout the U.S.

The announcement is available at http://www.uscis.gov/files/article/EB-5_12mar09.pdf.

Back to Top

5. Illinois E-Verify Statute Overturned

The U.S. District Court for the Central District of Illinois has overturned a statute enacted by Illinois that prohibited employers from enrolling in any employment eligibility verification systems "until the Social Security Administration (SSA) and Department of Homeland Security (DHS) databases are able to make a determination on 99% of the tentative nonconfirmation notices issued to employers within 3 days, unless otherwise required by federal law."

The court said that Illinois's statute "frustrates Congress' purpose by prohibiting Illinois employers from participating in the Federal Program unless the Federal Program meets Illinois' standard for accuracy and speed." Illinois cannot "dictate to Congress the standards that federal programs must meet, the court said, noting that "this clearly frustrates the Congressional purpose of making the Federal Program available to all employers. The Illinois Act is invalid under the Supremacy Clause."

The court noted that Illinois had argued that its statute did not frustrate the federal verification program because Congress had established it as a test program, and the federal government has been able to test the program for years. "This is no answer," said the court. "Even if Congress established the Federal Program as a test program, Congress is entitled to set the terms of the testing and the length of testing, not Illinois. Congress determined that all employers in the fifty states would be allowed to participate. Illinois cannot say no, or require the federal government to meet Illinois' standards."

The court concluded: "Section 12(a) of Illinois Public Act 95-138 is hereby declared to be invalid in violation of the Supremacy Clause of the United

States Constitution, and the State of Illinois is permanently enjoined from enforcing this invalid act. All pending motions are denied as moot."

The case is available at http://op.bna.com/dlrcases.nsf/id/jcwl-7q9mhj/$File/United%20States%20v.%20Illinois%20Op.pdf.

Back to Top

6. Deferred Enforced Departure Extended for Liberians

On March 20, 2009, the White House issued a memorandum deferring for 12 months the removal of any eligible Liberian national, or person without nationality who last habitually resided in Liberia, who is present in the U.S. and who is under a grant of deferred enforced departure (DED) as of March 31, 2009. The previous DED grant expired on March 31, 2009.

The memorandum is available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Deferred-Enforced-Departure-for-Liberians/. A related Q&A document is available at http://www.uscis.gov/files/article/Liberiaqa_26mar2009.pdf.

Back to Top

7. Court Rules on Concurrent Filings for Religious Workers

The U.S. District Court for the Western District of Washington recently ruled, in *Ruiz-Diaz v. U.S.*, that a U.S. Citizenship and Immigration Services (USCIS) regulation is "unreasonable and impermissible." The challenged regulation, 8 CFR § 245.2(a)(2)(i)(B), permits some people to file a visa petition and an application for adjustment of status concurrently while requiring others, including religious workers, to wait until USCIS has approved the employer's visa petition before filing their application for adjustment of status. The court found that "the Attorney General does not have discretion to choose who is eligible to apply for adjustment of status (that determination having been made by Congress), to interpret the same statutory provision in different ways depending on the classification of the applicant, or to waive a statutory requirement. Defendants may not, therefore, reject or refuse to accept plaintiffs' applications for adjustment of status based on the regulation barring religious workers from concurrent filing."

The court did not evaluate the constitutionality of the regulation or its validity under the Religious Freedom Restoration Act.

Ruiz-Diaz potentially provides religious workers who have filed I-360 petitions with the ability to concurrently file adjustment of status applications. This would allow religious workers whose underlying R visa status is expiring (the R is valid for five years) to remain in the U.S. as adjustment of status applicants. At present, the I-360 approval process is lengthy, after which point the religious worker can file an adjustment application, due to the need to conduct a site investigation on each filing.

The case is available at http://www.scribd.com/doc/13628825/RuizDiazvUS309.

Back to Top

8. Some Visa Categories Retrogress in April; Cut-Off Dates May Slow

Because of high adjustment of status demand, the Department of State said it has been necessary to retrogress the April employment third preference cut-off dates in an attempt to hold demand within the fiscal year (FY) 2009 annual limit. Because over 60 percent of the Worldwide and Philippines employment third preference demand received this year by U.S. Citizenship and Immigration Services has been for applicants with priority dates before January 1, 2004, the cut-off date has been retrogressed to March 1, 2003, to help ensure that future demand is reduced significantly. This cut-off date will be applied immediately. Further retrogression or unavailability at any time cannot be ruled out.

The Department noted that it has also been necessary to retrogress the employment third preference Other Worker cut-off date for all countries in order to hold the issuance level within the annual limit.

During the past year, many preference categories have experienced steady and sometimes rapid cut-off date movement. Such action is normally followed by an increase in applicant demand. Heavy applicant demand for numbers in some categories could require cut-off date movements to slow, stop, or even retrogress at some point during the remainder of FY 2009, the Department said, to hold visa use within the applicable annual numerical limits. Should such action occur, it would most likely be only temporary in nature, pending the start of the new fiscal year in October.

The Visa Bulletin for April 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4438.html.

Back to Top

9. New I-9 Form Goes Into Effect

The new I-9 Employment Eligibility Verification Form (I-9) is available at http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf. The new form, which is going into effect April 3, 2009, reflects the Department of Homeland Security's amended regulations governing the types of acceptable documents and receipts that employees may present to their employers for employment authorization verification.

An updated version of the *I-9 Handbook for Employers* also has been released. The new *Handbook* includes instructions on completing the form. The handbook is available at http://www.uscis.gov/files/nativedocuments/m-274_3apr09.pdf.

Back to Top

New Publications and Items of Interest

EB-5 recommendations. U.S. Citizenship and Immigration Services' Ombudsman has released recommendations for the EB-5 immigrant visa. Congress allocates approximately 10,000 immigrant visas per year to the EB-5 category (including derivative visas for the spouses and minor children of investors), although fewer than 1,000 visas are used annually. The ombudsman said this underutilization is caused by a confluence of factors, including program instability, the changing economic environment, and more inviting immigrant investor programs offered by other countries.

The ombudsman's recommendations included, among other things, finalizing regulations to implement the 2002 EB-5 legislation, which offers a certain subgroup of EB-5 investors a pathway to cure deficiencies in their previously submitted petitions; offering a "Special Handling Package" option to EB-5 investors for faster adjudication of Forms I-526, I-829, and related applications for a higher fee; and prioritizing the review and processing of all Regional Center EB-5 related petitions and applications to foster the immediate creation and preservation of jobs.

The report is available at http://www.dhs.gov/xlibrary/assets/CIS_Ombudsman_EB-5_Recommendation_3_18_09.pdf.

REAL ID implementation. The Department of Homeland Security's Office of Inspector General (OIG) released a new report in March 2009, "Potentially High Costs and Insufficient Grant Funds Pose a Challenge to REAL ID Implementation." The Inspector General found that state officials considered REAL ID implementation costs prohibitive because of requirements such as

the re-enrollment of all current driver's licenses and identification card holders and the new verification processes.

Further, state officials in 17 of the 19 states the OIG contacted said they needed more timely guidance from the Department of Homeland Security (DHS) to estimate the full cost of implementing REAL ID. State officials also said that REAL ID grants did not sufficiently mitigate the costs, and they viewed communication of grant information by DHS as ineffective.

The OIG recommended that the Assistant Secretary for Policy (1) ensure stakeholders consisting of federal, state, and private representatives help develop and disseminate necessary guidance related to the REAL ID card marker, facility security, verification systems, and best practices that would assist stakeholders in implementing REAL ID; and (2) establish a communications plan to ensure that stakeholders receive the necessary REAL ID program and grant guidance.

The report is available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_09-36_Mar09.pdf.

Entrepreneurs returning to home countries. The Kauffman Foundation has released a study by Harvard professor Vivek Wadhwa, "America's Loss Is the World's Gain: America's New Immigrant Entrepreneurs, Part IV." The report notes that a substantial number of highly skilled immigrants have begun returning to their home countries after studying and/or working in the U.S. Most returnees originally came to the U.S. for professional and educational development opportunities, and the majority of returnees cited career and quality of life as the main reasons to return to their home countries rather than stay in the U.S. Many cited opportunities to start businesses in their home countries that they felt were better than those in the U.S., as well as family considerations; many returnees considered care for aging parents to be much better in their home countries, for example. For more information on this report, see http://www.kauffman.org/newsroom/united-states-losing-immigrants-who-spur-innovation-and-economic-growth.aspx.

Back to Top

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 online:
https://egov.uscis.gov/cris/jsps/ptimes.jsp

Department of Labor processing times and information on backlogs:
http://www.foreignlaborcert.doleta.gov/times.cfm

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