LitwinLaw Update

March 1, 2009

Headlines:

➢ **1. Economic Stimulus Bill Includes H-1B Restrictions for TARP Recipients** - The final economic stimulus legislation includes H-1B restrictions for recipients of TARP. Most of the persons on this email are not with TARP recipients – but such restrictions may be coming to all employees in the future.

➢ **2. US-VISIT Procedures Expanded to Additional Travelers** - All non-U.S. citizens, except certain Canadians, must follow US-VISIT procedures when entering the U.S.

➢ **3. DHS Directive Includes Analysis of E-Verify** - The directive requires specific DHS programs to work with state and local partners to address concerns about the E-Verify system.

➢ **4. DOL To Release New LCA and PERM Forms** - The DOL has redesigned the Labor Condition Application (LCA) Form ETA 9035, effective April 15, 2009, and the Labor Certification Form 9089 (PERM form), effective July 1, 2009.

➢ **5. CBP Discusses Immigrant Intent for Trade NAFTA Applicants** - A recently released letter discusses immigrant intent for TN applicants whose spouses are the beneficiary of an I-140 petition.

➢ **6. New Orleans Hotelier Need Not Reimburse H-2B Workers for Certain Expenses, Court Rules** - Recruitment, transportation, and visa expenses that the workers incurred before relocating to the U.S. to work for the hotelier need not be reimbursed.

➢ **7. DHS Issues Final Rule Providing Employment Verification for Certain Enlistees of Armed Forces** - The rule also adds the military identification card to the list of documents acceptable for I-9 purposes, but only for use by the Armed Forces to verify the employment eligibility of persons lawfully enlisted.

➢ **8. State Dept. Releases Guidance on B-1 Visas for Missionaries** - The Department of State released guidance on B-1 visas for missionaries to all diplomatic and consular posts.

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Details...

1. Economic Stimulus Bill Includes H-1B Restrictions for TARP Recipients

The recently enacted economic stimulus law (the American Recovery and Reinvestment Act of 2009) includes H-1B restrictions for recipients of TARP (Troubled Assets Relief Program) funds. It specifies that during the two-year period beginning on the date of enactment, any recipient of TARP funding (under title I of the Emergency Economic Stabilization Act of 2008 or section 13 of the Federal Reserve Act) is generally prohibited from hiring any H-1B nonimmigrant unless the recipient complies with the requirements for an H-1B dependent employer.

An H-1B dependent employer must comply with the following attestations:

- That the employer has, before filing the H-1B petition, taken good-faith steps to recruit U.S. workers for the position for which the H-1B worker is sought, offering a wage that is at least as high as that required under law to be offered to the H-1B worker. The employer must also attest that, in connection with this recruitment, it has offered the job to any U.S. worker who applies and is equally or better qualified for the position.

- That the employer has not laid off, and will not lay off, any U.S. worker in a job that is essentially equivalent to the H-1B position in the area of intended employment of the H-1B worker within the period beginning 90 days before the filing of the H-1B petition and ending 90 days after its filing.

Although the normal H-1B dependent employer rule provides an exemption from these attestations if an H-1B worker either possesses a master's degree or receives wages of $60,000 or higher, the new law does not allow TARP funding recipients to claim these exemptions.

Only employers that receive funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343, also known as the "TARP Bill") or that received funding under Section 13 of the Federal Reserve Act (12 U.S.C. § 342 *et seq*., authorizing the Federal Reserve's "Discount Window" for short-term, secured loans to financial institutions and other companies) are subject to these restrictions. Companies that will receive funds under the recently enacted stimulus law are not subject to these H-1B restrictions.

The new law defines "hire" as permitting "a new employee to commence a period of employment." Therefore, the restriction should not apply to H-1B extension requests filed on behalf of current H-1B employees of covered employers. It also should not cover existing current employees who are in another status such as F, TN, or L-1A, and are seeking to change status to H-1B. However, the new legislation likely will cover new employees seeking to transfer in H-1B status from another employer to a covered employer. Note that neither U.S. Citizenship and Immigration Services nor the Department of Labor has implemented any regulations or guidance on this yet.

2. US-VISIT Procedures Expanded to Additional Travelers

Under a Department of Homeland Security final rule effective January 18, 2009, all non-U.S. citizens, except Canadians applying for admission to the U.S. as B-1/B-2 visitors for business or pleasure and those specifically exempted, must follow US-VISIT procedures when entering the U.S.

US-VISIT requires noncitizens to be photographed and fingerprinted so that appropriate databases can be checked. In many cases, this process begins overseas at a U.S. visa-issuing post, where a traveler's biometrics—digital fingerprints and a photograph—are collected and checked against a watch list of known criminals and suspected terrorists. When the traveler arrives in the U.S., the Department of Homeland Security collects the same biometrics to verify that the person at the port of entry is the same person who received the visa. Immigration officials use this information to help them make visa-issuance and admission decisions as part of the visa application process or entry inspection.

The following additional non-U.S. citizens now must provide biometrics when entering or re-entering the United States:

- Lawful permanent residents of the United States (LPRs);
- Persons entering the U.S. who seek admission on immigrant visas;
- Persons entering the U.S. who seek admission as refugees and asylees;
- Canadian citizens who are currently required to obtain a Form I-94 (Arrival-Departure Record) upon entry or who require a waiver of inadmissibility to enter the U.S. (this excludes most Canadian citizens entering the U.S. for purposes of shopping, visiting friends and family, vacation or short business trips);

- Persons paroled into the U.S.; and
- Persons applying for admission under the Guam VWP.

Also as of January 18, 2009:

- Canadians applying for admission to the U.S. under a B-1 or B-2 nonimmigrant classification for business or pleasure, which represents most Canadian travelers to the U.S., are not required to enroll in US-VISIT.
- Canadian citizens who must now enroll in US-VISIT are those issued an I-94, including:
    - Canadians applying for admission in the following nonimmigrant classifications: C, D, F, H, I, J, L, M, O, P, Q 1, Q 3, R, S, T, TN; and
    - Canadians who are granted a waiver of inadmissibility to enter the U.S.
- H-1B visa holders will follow existing protocols and will be screened through US-VISIT when applying for a new multiple entry I-94 or when referred to secondary inspection for other reasons.
- At seaports, LPRs returning from a "closed loop" cruise (cruises that begin and end at the same port in the U.S.) are exempt from US-VISIT processing. LPRs returning to the U.S. from an "open" cruise are subject to US-VISIT processing.
- Non-U.S. citizens entering or re-entering the U.S. at a land border port of entry will be processed somewhat differently, as follows, at the inspecting officer's discretion:
    - LPRs will provide biometrics only if they are referred to secondary inspection.
    - All other non-U.S. citizens included in this final rule, unless specifically exempt, will experience US-VISIT procedures during secondary inspection, just as most non-U.S. citizens already subject to US-VISIT procedures currently do (e.g., those who require an I-94).

- Non-U.S. citizens who seek admission with Border Crossing Cards and who do not have an I-94 will still go through US-VISIT procedures, at the discretion of U.S. Customs and Border Protection officers.

  The final rule is available at http://edocket.access.gpo.gov/2008/E8-30095.htm.

3. DHS Directive Includes Analysis of E-Verify

U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano announced on January 30, 2009, a wide-ranging action directive on immigration and border security. The directive requires specific DHS programs to work with state and local partners to report on the E-Verify system, legal immigration benefit backlogs, and other concerns.

Some of the questions the directive asks about E-Verify include, "What is the status of the employer monitoring and compliance efforts of the E-Verify system? How can DHS expand such monitoring, including alternative strategies such as electronic detection of suspicious patterns, with an indication of resource requirements? What strategies are available to minimize false negatives? What steps and resources are needed to secure a systematic and detailed study of the origin, prevalence, and types of erroneous non-confirmations, including measuring the rate of correct non-confirmations, and how much time would be required for such a study?"

The full text of the directive is available at http://www.dhs.gov/ynews/releases/pr_1233353528835.shtm.

4. DOL To Release New LCA and PERM Forms

The Department of Labor (DOL) has redesigned the Labor Condition Application (LCA) Form ETA 9035, effective April 15, 2009, and the Labor Certification Form 9089 (PERM form), effective July 1, 2009. The DOL also noted at a February 4, 2009, public briefing that it has up to seven working days, effective with the new form on April 15, 2009, to certify an LCA. (The old LCA form may be used without the seven-day requirement up to May 14.) In both forms, more information and details are required about the employer, employee, job title, and attorney.

The new ETA Form 9089 is available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9089_PEC.pdf . The new ETA Form 9035/9035E is available at http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035_LCA_Non_Immigrant.pdf . Links to handouts, instructions, and a fact sheet are available at http://www.foreignlaborcert.doleta.gov/ (scroll down).

5. CBP Discusses Immigrant Intent for Trade NAFTA Applicants

A recently released letter sent on April 21, 2008, from Paul M. Morris, Executive Director, Admissibility and Passenger Programs, U.S. Customs and Border Protection (CBP), to Micron Technology, Inc., discusses immigrant intent for Trade NAFTA (TN) applicants whose spouses are the beneficiary of an I-140 petition. Mr. Morris states that CBP's determination is that "the mere filing or approval of an immigrant petition does not automatically constitute intent on the part of the beneficiary to abandon his or her foreign residence. This would hold for a TN principal who may be riding on a spouse's immigrant petition."

The letter notes that a TN applicant could have the intent to immigrate or adjust status at a future time, but as long as his or her intent at the time of filing the application for admission is to be in the U.S. for a temporary period under NAFTA and applicable regulations, he or she could be admitted. However, "once a TN files an application for an immigrant visa or adjustment of status, then the TN would no longer be eligible for admission or an extension of stay as a TN nonimmigrant. The NAFTA professional must establish that the intent of entry is not for permanent residence."

In an earlier letter, sent in 1996 from Yvonne M. La Fleur, Chief, Business and Trade Services Branch, to ABIL Member William Z. Reich, Ms. Fleur states that "[t]he fact that an alien is the beneficiary of an approved I-140 petition may not be, in and of itself, a reason to deny an application for admission, readmission, or extension of stay if the alien's intent is to remain in the United States temporarily. Nevertheless, because the Service must evaluate each application on a case-by-case basis with regard to the alien's intent, this factor may be taken into consideration along with other relevant factors every time that a TN nonimmigrant applies for admission, readmission or a new extension of stay. Therefore...if the inspecting officer determines that the individual has abandoned his or her temporary intent, that individual's application for admission as a TN nonimmigrant may be refused."

The new letter may be helpful in that it reaffirms the policy of allowing TNs, who may stay in the U.S. up to three years, to enter and extend their stay, assuming their intent is to remain only. Application of the law remains inconsistent across various ports of entry. Many cases come down to proving that the individual is not entering the U.S. with the intent to establish permanent residence upon that entry.

Contact your Alliance of Business Immigration Lawyers member for details and help with TN cases.

The April 2008 letter is available at http://www.aila.org/content/default.aspx?docid=28002. An excerpt from the 1996 letter is available at http://www.naftatnlawyer.com/i-140-filing-not-dispositive-f/.

Additional information on presumption of immigrant intent is available at http://www.naftatnlawyer.com/presumption-of-immigrant-inten/.

6. New Orleans Hotelier Need Not Reimburse H-2B Workers for Certain Expenses, Court Rules

The aftermath of Hurricane Katrina required New Orleans hotelier Decatur Hotels, L.L.C, to look to foreign sources of labor. A group of these employees who held H-2B visas while working for Decatur contend that the hotelier violated the Fair Labor Standards Act (FLSA) by paying them less than the minimum wage when Decatur refused to reimburse them for recruitment, transportation, and visa expenses that they incurred before relocating to the U.S. to work for Decatur.

In an interlocutory appeal to the U.S. Court of Appeals for the Fifth Circuit, Decatur raised three issues of first impression for the court: whether under the FLSA an employer must reimburse guest workers for (1) recruitment expenses, (2) transportation expenses, or (3) visa expenses that the workers incurred before relocating to the employer's location. The court concluded on February 11, 2009, that the FLSA does not require an employer to reimburse any of these expenses. The court therefore reversed the district court's order, and remanded the case with instructions that it be dismissed.

The decision is available at http://www.ca5.uscourts.gov/opinions/pub/07/07-30942-CV0.wpd.pdf.

7. DHS Issues Final Rule Providing Employment Verification for Certain Enlistees of Armed Forces

Effective February 23, 2009, the Department of Homeland Security (DHS) has issued a final rule providing for employer-specific employment authorization for certain people lawfully enlisted into the U.S. Armed Forces, and those whose enlistment the Secretary with jurisdiction over the force to which the person belongs has determined would be vital to the national interest. This rule also adds the military identification card to the list of documents acceptable for establishing employment eligibility and identity for the Employment Eligibility Verification Form (Form I-9), but only for use by the Armed Forces to verify employment eligibility of persons lawfully enlisted in the Armed Forces.

The full text of the final rule is available at http://edocket.access.gpo.gov/2009/pdf/E9-3801.pdf.

8. State Dept. Releases Guidance on B-1 Visas for Missionaries

The Department of State released the following guidance on B-1 visas for missionaries to all diplomatic and consular posts on February 13, 2009:

> 1. VO has recently received inquiries from a religious group claiming that applicants applying for visas to perform missionary work in the United States, who are ineligible for R status because they have not been members of the religious organization for two years, are not alternatively considered eligible for B-1 .... This cable reminds posts that the B-1 note regarding religious activities is still in effect and provides an alternative method for bona fide religious workers to enter the United States.
>
> 2. In cases where the applicant is a recent member of the religion and cannot demonstrate two-year membership in an affiliated organization, B-1 status remains an option where the applicant meets the requirements in 9 FAM 41.31 note 9.1. This is true even if the applicant who meets the qualifications in the note intends a stay of one year or more in the United States. 9 FAM 41.31 note 3.1 provides that the period of stay in a given case may exceed six months or one year is not in itself controlling, provided the consular officer is satisfied that the intended stay has a time limitation and is not indefinite in nature.
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> 3. We would also like to remind posts that many cases involving religious workers generate substantial public or congressional interest. Therefore, it may be prudent to consider requesting an advisory opinion, or sending information cables to the Department in cases where a refusal might generate a response from the sponsoring religious organization.

The text of this cable is posted at http://travel.state.gov/visa/laws/telegrams/telegrams_4430.htm.

New Publications and Items of Interest

Case information for the Permanent, H-1B, H-2A, and H-2B programs for fiscal year 2008 is available on the Case Data pages at http://www.flcdatacenter.com/casedata.aspx.

The Department of Homeland Security has released the following reports:

- Estimates of the Legal Permanent Resident Population in 2007 (http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_pe_200

7.pdf) This report provides estimates of the legal permanent resident population and population eligible to naturalize as of January 2007.

- The Foreign-Born Component of the Uninsured Population (http://www.dhs.gov/xlibrary/assets/statistics/publications/uninsured_fs_2007.pdf) This report provides information on the trends in the population without health insurance coverage by nativity and citizenship status.

- Characteristics of Major Metropolitan Destinations of Immigrants (http://www.dhs.gov/xlibrary/assets/statistics/publications/metro_fs_2006.pdf)
  The report provides information on leading metropolitan destinations of immigrants ranked by immigrant population growth rates and selected economic and social indicators.

Performance of immigration agencies within DHS. The Migration Policy Institute (MPI) released a comprehensive report on February 9, 2009, assessing the performance of the three immigration agencies within the Department of Homeland Security (DHS), offering detailed recommendations for policy and operational changes that could be accomplished by the executive branch without legislation.

The report, *DHS and Immigration: Taking Stock and Correcting Course*, offers an assessment of immigration policy direction and coordination almost six years into the life of the department.

The MPI report follows a months-long review of the three agencies —U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) — along with overall DHS immigration policy. The analysis, based on extensive MPI research, also was informed by roundtable discussions with senior DHS officials, congressional staff, stakeholders, state and local law enforcement officials, advocates and policy experts.
The report is available at http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

MPI also recently launched its Labor Markets Initiative, which is a comprehensive, policy-focused review of the role of immigration in the labor market. The Initiative will produce detailed policy recommendations on how the U.S. should rethink its immigration policy in light of what is known about the economic impact. The Initiative is guided by a group of leading experts in labor economics, welfare policy, and immigration.

"Immigrants and the Current Economic Crisis," a research product of MPI's Labor Markets Initiative, examines how the number of immigrants has changed since the recession began; how legal and undocumented immigration flows may change; and how immigrants fare in the labor market during downturns. The report is available at http://www.migrationpolicy.org/pubs/lmi_recessionJan09.pdf.

Foreign labor certification visa portal. The Department of Labor has announced a new Office of Foreign Labor Certification visa portal, the "iCERT System." The system allows users to prepare and submit applications, pre-populate visa forms with business and contact information; create and manage sub-account users (e.g., human resources staff or in-house legal counsel) to prepare and submit applications on a person's behalf; track the status of applications across visa programs through a single account; submit requests to withdraw applications or authorize sub-account users to do so on a person's behalf; and notify the Department of Labor if an application for labor certification has been submitted without the user's authorization. See http://www.ilw.com/immigdaily/news/2009,0205-PERM.pdf.

Meanwhile, the Department of Labor also released the following information about fiscal year 2009 PERM certifications (October 1, 2008, to December 31, 2008):

Approximately 3,074 cases were certified during the first quarter of FY 2009; 74% of these foreign workers were on H-1B visas. The top five states of intended employment for these permanent labor certifications were California (509), New York (474), New Jersey (326), Florida (211); and Pennsylvania (173). Beneficiaries representing 122 different countries were certified for permanent employment in the U.S. The top 10 countries of citizenship of beneficiaries included India (1,219), China (254), Canada (174), South Korea (120), Philippines

(113), Mexico (99), United Kingdom (79), Colombia (54), Venezuela (52), and France (46).

Top job titles certified for permanent employment included Computer Software Engineers (632), Computer Systems Analysts (194), Computer and Information System Managers (135), Financial Analysts (115), Electronics Engineers (105), Electrical Engineers (88), Accountants (77), Mechanical Engineers (76), Restaurant Cooks (71), and Operations Research Analysts (70).

Additional information is available at http://www.ilw.com/immigdaily/news/2009,0205-PERM.pdf.

Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2008. This report provides estimates as of January 2008 by period of entry, region and country of origin, state of residence, age, and gender. See http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

Public resource.org. The tag line of Public.Resource.Org is "Making Government Information More Accessible." The site has an agency directory by Web address. See http://public.resource.org/.

Citizen journalist's guide to open government. The Citizen Journalist's Guide to Open Government, provided by the Knight Citizen News Network, is divided into 10 "doors," covering a variety of topics, from "Access to Courts" to "Following Up on Records Requests." Behind each door, there are expert interview clips and information about how to secure access to crucial documents, meetings, and court reports. A weblog provides users with a place to ask questions about government records, meetings, or courts. See http://www.kcnn.org/open_government/.

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