

## Immigration Advisory

**MINTZ LEVIN**  
Mintz Levin Cohn Ferris Glovsky and Popeo PC

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# Immigration News Updates: Recently Enacted or Proposed Immigration Policies

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## Update on H-1B Visa Count

As of May 6, 2011, U.S. Citizenship and Immigration Services (USCIS) had received 10,200 cap-eligible H-1B petitions against the Fiscal Year 2012 65,000 cap amount. As of this date, USCIS had also received 7,300 cap-subject petitions against the 20,000 U.S. Master's cap allocation. (At this same time last year, 19,600 cap-eligible H-1B petitions had been filed, along with 8,200 petitions for the U.S. Master's cap. The annual quota for Fiscal Year 2011, just completed, was reached at the end of January 2011.)

We will continue to keep you updated regarding the H-1B usage numbers so that you can plan accordingly. As soon as you identify a candidate whom you wish to sponsor for an H-1B visa, please contact your regular Mintz Levin contact to initiate the process.

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## TPS Extended for Haitian Nationals

On May 17, 2011, Secretary of Homeland Security Janet Napolitano announced the extension of Temporary Protected Status (TPS) for Haitian nationals. The extension will take effect July 23, 2011, and will allow these TPS beneficiaries to remain in the United States through January 22, 2013. Currently, approximately 48,000 Haitian nationals with TPS reside in the United States, following the devastating earthquake in Haiti in January 2010. Furthermore, and very importantly, Secretary Napolitano is re-designating Haiti for TPS. This means that eligible Haitian nationals who have continuously resided in the United States since January 12, 2011 will also be able to obtain TPS through January 22, 2013.

Under the original designation, TPS applicants needed to show that they had continuously resided in the United States since January 12, 2010, but the re-designation now permits eligible individuals who arrived up to one year after the earthquake to receive the protection of TPS. This re-designation does *not* benefit Haitians who are not currently in the United States—it only benefits those Haitians who have continuously resided in the United States since January 12, 2011. USCIS has advised that potential beneficiaries of this new law should not immediately apply but wait for further instructions forthcoming soon.

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## State Department Voids Announced Results of 2012 Diversity Lottery Program

The U.S. State Department has announced that due to a computer programming error, it has voided

the results of the 2012 Diversity Lottery that were posted on the agency's website. There is a 30-day period during which applicants may register for the program, and the randomly selected "winners" are supposed to be selected from applications submitted throughout the 30-day period. However, a computer programming error caused the State Department to improperly select 90% of the "winning" applicants from registrants who had registered with the State Department during the first two days of the 30-day registration period. Since the "winners" did not represent a fair sample of the registrants, the State Department is going to conduct a new random selection based on the original entries.

Anyone who submitted a qualified entry between October 5, 2010 and November 3, 2010 will be in the pool for the random selection, and does not need to re-apply. New entries will not be accepted. Needless to say, there are many disappointed would-be "winners," but applicants for the Diversity Lottery must remember that being selected as a "winner" of the visa lottery is no guarantee of approval of future permanent residence status. The State Department always selects far more "winners" than there are immigrant visa numbers to distribute, and only "winners" with low winning numbers have a chance of truly "winning" a green card.

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## Significant Advancement for the Employment-Based Second Preference (EB-2) Categories for China and India in June

Under U.S. immigration law, employment based (EB) immigrant (green card) visas are divided among various preference categories. The first preference category is reserved for applicants who are either (a) persons of extraordinary ability in their field; or (b) outstanding researchers or professors; or (c) multinational managers or executives. This category is rarely backlogged because it is the hardest category to meet. The second preference (EB-2) category is for persons filling positions that require either an advanced degree or a bachelor's degree and at least five years of experience. The third preference category (EB-3) is for persons filling positions that require less than a bachelor's degree and five years of experience but more than two of years of work experience.

Because of the limit on the numbers of immigrant visas that may be issued by the U.S. government each fiscal year, and the fact that the yearly allocations are divided among geographic regions of the world, it is frequently the case that the EB-2 and EB-3 immigrant visa categories are severely backlogged for persons born in China and in India, due to heavy demand for immigrant visas by persons born in those countries.

There was a notable exception to this backlogged state of affairs during the summer of 2007 when both the EB-2 and EB-3 categories suddenly became "current," allowing hundreds of thousands of people to submit their permanent residence applications at the same time. Each green card applicant has a "priority date" that is established by the filing of the first step in the green card process for him or her. One's "priority date" must be current in the relevant immigrant visa category, in order to file the last step of the green card process. Shortly after the priority dates became current during the summer of 2007, the categories reverted back to their backlogged state.

There is an enormous group of people in this country with pending permanent residence applications, which were filed in the summer of 2007 when the priority dates became current. Because the priority dates quickly became backlogged again, these applications have not been approved by USCIS; they can only be approved when the applicant's priority date becomes current again.

It is significant, therefore, that in June 2011, EB-2 China will advance two and one-half months to October 15, 2006, and EB-2 India will advance three and one-half months, also to October 15, 2006. Indeed, this month in May 2011, the EB-2 category for China is backlogged to August 1, 2006, and the EB-2 category for India is backlogged to July 1, 2006.

With the China and India EB-2 priority date advancement, it is important to identify derivative beneficiaries who were not able to file their own I-485 applications with the primary beneficiary. This

could involve a significant number of individuals, since many primary beneficiaries were able to file their I-140/I-485 applications when all the employment-based preference categories became current in the summer of 2007 and then became backlogged.

Eligible derivative beneficiaries include spouses and unmarried children younger than 21 years. This could include spouses and children who were traveling outside the United States when the visa numbers opened up in the summer of 2007 or individuals who were subsequently married to the primary beneficiary or children who were subsequently born to the primary beneficiary. They would now be eligible to file their own I-485 applications in June if the primary beneficiary's priority date is prior to October 15, 2006.

It is extremely important for derivative beneficiaries who are in the United States in H-4 or L-2 status to be prepared to file their I-485 applications in June, since their status is dependent on the primary beneficiary maintaining his or her H-1B or L-1 status. As soon as the primary beneficiary's I-485 application is approved and he/she becomes a U.S. permanent resident, the derivative beneficiaries are no longer entitled to H-4 or L-2 status. Typically, the USCIS Nebraska Service Center or Texas Service Center will adjudicate the principal applicant's I-485 permanent residence application as soon as the priority date becomes current again.

Accordingly, please contact us immediately if your employees have any dependents (spouse or children younger than 21) who will be entitled to file I-485 permanent residence applications in June.

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