# Immigration Advisory: Recent Immigration Developments: The H-1B Count, Summer Travel, Arizona and Massachusetts Law, E-Verify and STEM Extension

5/11/2010

**Update on U.S. Citizenship and Immigration Services H-1B "Cap" Count**

On May 6, 2010, U.S. Citizenship and Immigration Services (USCIS) announced that H-1B petitions subject to the Fiscal Year 2011 numerical "cap" may still be filed. This includes H-1B petitions filed towards the 65,000 general cap, as well as the 20,000 additional H-1B petitions that may be filed for beneficiaries holding a U.S.-awarded master's degree or higher.

As of May 6th, the USCIS has accepted approximately 18,000 general cap H-1B petitions and roughly 7,600 petitions for beneficiaries with U.S.-awarded advanced degrees. This announcement makes it clear that, at least for the foreseeable future, new H-1B petitions may be filed with an expectation of acceptance for processing. And unlike past years, no "lottery" will be necessary to determine which of the cap petitions filed in April will be accepted for filing.

**Summer Travel for FY 2011 H-1B Cap Filers**

Summer is a popular time to travel for many students and others alike to visit family and attend business conferences. However, travel while an FY 2011 H-1B cap case is pending carries some risks, and in some cases might prevent the beneficiary from reentering the U.S. at all.

The beneficiary of a FY 2011 H-1B cap petition will not be changing his or her status until, at the earliest, October 1, 2010. However, travel while the H-1B cap petition is pending can impact that beneficiary's ability to administratively change into H-1B status automatically come October 1, 2010. When an employer files an H-1B petition, it is effectively asking for two approvals. The first request is asking USCIS to agree that the position and the beneficiary meet the qualifications of specialty occupation as is required under H-1B regulation. The second request is for the beneficiary to then either automatically "change status" to H-1B, or to not have the H-1B become effective until the beneficiary seeks an H-1B visa at a U.S. Consulate abroad. Most petitions, though not all, contain a request that the beneficiary's status be automatically changed effective October 1, 2010—this automatic change is reflected in the new I-94 card issued with the H-1B approval that has a starting validity date of October 1, 2010. International travel while a FY 2011 H-1B cap petition is pending can impact this requested change of status. If the H-1B petition is approved before the beneficiary leaves the U.S., specific guidance from USCIS indicates that the change of status request will automatically take effect on October 1, 2010. However, if the H-1B petition is approved while the beneficiary is outside the U.S.—or if it is approved after the beneficiary returns to the U.S.—the change of status request will be

deemed to have been abandoned. This means that sometime after the H-1B petition's effective date, the employee will need to leave the U.S., obtain an H-1B visa stamp, and reenter the U.S. to effectuate his or her H-1B status.

*Travel for F-1 Students Whose OPT Expires before October 1, 2010*

F-1 students who have an Employment Authorization Document (EAD) based on approved Optional Practical Training (OPT) expiring between now and October 1, 2010—and whose employers have filed an H-1B petition requesting a change of status on their behalf—benefit from the "cap-gap" provisions extending their work authorized status from the EAD card expiration date up until when their H-1B status presumably becomes valid (October 1, 2010). However, this extension of status **does not carry with it travel authorization**. In order to travel in F-1 status and properly reenter the U.S. in F-1 status prior to October 1, 2010, a foreign national must possess the following: Form I-20 from the university's Foreign Student Advisor, endorsed for travel to include the cap-gap period; a valid F-1 visa stamp; a valid EAD card; and a letter from his or her employer confirming ongoing employment in a field that is appropriate for the degree earned. USCIS will not issue or extend EAD cards for F-1 students who are in the "cap-gap" work authorization time period, and neither Customs and Border Protection nor the U.S. State Department will allow reentry or issue new visas without the EAD card. This means that the F-1 student in cap-gap authorization who travels during that period is prevented from reentering the U.S. until his or her H-1B petition is valid come October. Accordingly, someone who travels during the "cap-gap" period may find him or herself unable to timely return to the U.S.

The take-away point is that while international travel during one's OPT period is not specifically prohibited, doing so can create unnecessary problems in the future. With these considerations in mind, employers and employees should consult with counsel *prior to scheduling any travel this summer.*

**New Arizona Immigration Law**

Arizona's new immigration law, SB 1070, is the latest in a series of state legislative initiatives designed to address illegal immigration on a local level. While some state legislation introduced has been beneficial to immigrants, punitive state measures and sanctions such as SB 1070 are increasingly extreme.

On April 23, 2010 Arizona Governor Jan Brewer signed the bill, known as the "Support Our Law Enforcement and Safe Neighborhoods Act." The bill takes effect 90 days after the current legislative session adjourns. The stated purpose of the law is "to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States." The law is far-reaching and includes provisions that:

1. require police to determine a person's immigration status when they have a reasonable suspicion that the person is unlawfully present in the U.S.
2. make it a misdemeanor to fail to carry proper immigration documents (and a felony upon second offense of this provision)

3. make it a crime to transport or attempt to transport a person where one knows (or is in reckless disregard of the fact) that the person has come to, entered or remains in the U.S. in violation of the law
4. make it a crime to hire day laborers if the motor vehicle used to pick up such laborers "blocks or impedes the normal movement of traffic"
5. authorize the impoundment or forfeiture of vehicles driven by illegal aliens, or that are used to unlawfully transport them.

   Violation of the provisions with regard to transporting or harboring illegal immigrants constitute a misdemeanor, except that where 10 or more immigrants are involved, the offense rises to the level of a felony.

   The law further contains provisions that:

6. make it a crime to encourage or induce an alien to come to or reside in Arizona if one knows (or recklessly disregards the fact) that coming to/entering the state is or will be in violation of the law
7. provide a private right of action by any individual person against any city or state official or agency that adopts or implements any policy that limits or restricts the enforcement of the federal immigration law
8. require employers to maintain a record of an employee's E-Verify eligibility verification for either (a) the duration of employment or (b) at least three years.

There are significant penalties relative to the employment of illegal immigrants, which mirror those in prior Arizona immigration bills and involve, among other things, penalties including permanent revocation of all licenses to conduct business in the state of Arizona where an employer has knowingly employed illegal immigrants.

While the Arizona legislature has not yet determined the costs associated with S.B. 1070, economic indicators reveal the potential cost of implementation to Arizona taxpayers to be in the millions. A similar Arizona enforcement bill in 2006 (which then-Governor Janet Napolitano vetoed) was analyzed by Yuma County Sheriff Ralph Ogden, who reported a staggering potential cost to law enforcement agencies in Yuma County. The fact sheet projected that:

- Law-enforcement agencies would spend between $775,880 and $1,163,820 in processing expenses.
- Jail costs would be between $21,195,600 and $96,086,720.
- Attorney and staff fees would be $810,067 - $1,620,134.
- Additional detention facilities would have to be built at unknown costs.

That assessment was just for Yuma County, which has a population of 200,000 and is one of 15 counties in Arizona. Such costs don't anticipate expenses incurred as a result of potential lawsuits on behalf of legal immigrants and native-born Latinos who feel they have been unjustly targeted. Local legislation in Texas which required landlords to verify potential renters' immigration status has cost the city $3.2 million in legal fees to defend itself since September

2006—and the bill is expected to exceed $5 million by the end of fiscal year 2010 (even though the bill has been overturned).

Additional highly significant costs include the number of immigrants and Latinos who would potentially leave the state due to the climate created by the new law and rampant fears of racial profiling—taking with them their tax dollars, businesses, and purchasing power. An Immigration Policy Center (IPC) fact sheet notes that:

- The total economic output attributable to Arizona's immigrant workers was $44 billion in 2004, which sustained roughly 400,000 full-time jobs.
- Over 35,000 businesses in Arizona are Latino-owned and had sales and receipts of $4.3 billion and employed 39,363 people in 2002.
- The Perryman Group estimates that if all unauthorized immigrants were removed from Arizona, the state would lose $26.4 billion in economic activity, $11.7 billion in gross state product, and approximately 140,324 jobs, even accounting for adequate market adjustment time.

Statutes such as SB 1070 are promoted and enacted based on perceptions that the federal government has failed to act and that states must take action in any way they can to regulate illegal immigration. However clearly, implementing S.B. 1070 comes with significant price tags. Proponents and opponents alike have seized on this legislation as another opportunity to urge Congress to aggressively consider their responsibility in moving forward with immigration reform. Arizona's statute is a strong reminder that this issue must remain at the top of the Congressional agenda.

**Department of Homeland Security Issues New E-Verify FAQs**

As we have previously highlighted in Client Alerts, federal regulations (published at (73 Fed. Reg. 67,651 (Nov. 14, 2008)) now require most federal government contractors to use the E-Verify system to verify the employment eligibility of new hires, as well as certain existing employees. E-Verify is an electronic system administered jointly by the Department of Homeland Security and the Social Security Administration for the verification of employment authorization. E-Verify provides access to federal databases to help employers determine the employment eligibility of new hires and the validity of their Social Security numbers. Once an employer becomes subject to the federal contractor E-Verify provisions, it will be required to verify not only new hires, but also all existing employees who perform work assigned under the contract.

On April 23, 2010, USCIS issued a revised list of Frequently Asked Questions (FAQs) and answers on the E-Verify regulation. Topics in the new FAQs include federal contracts affected by the rule, employees affected by the rule, enrollment, initiating E-Verify inquiries and subcontractors, etc. Some items to note:

- If an employer accepts any **grant monies** from the federal government, and the E-Verify clause is contained in the terms and conditions of that grant, the employer is required to use E-Verify.
- Existing employees assigned to a federal contract that contains the E-Verify clause are bound by the E-Verify clause. Employees are only considered assigned to a contract if they are **directly performing work under the federal contract**. An employee is not considered to be directly performing work under the contract *if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract*.
- An employee working directly on a federal contract that contains the E-Verify clause is subject to E-Verify *even if his/her employment on the contract will only last for a few days*. Employees are not exempt based on the **intermittent nature of the work** or the length of time spent performing the work.
- Federal contractor employers who use **temporary workers** from an outside agency must ensure by *whatever means the employer considers appropriate* that the staffing agency verified the temporary workers in E-Verify. Staffing agencies should provide proof of enrollment in E-Verify to the employer by printing certain screen shots from their E-Verify systems.
- An employer may enroll in E-Verify via the **Web Services Access Method**, which requires the employer to develop software that interfaces with USCIS to perform employment eligibility verifications of newly hired employees. The employer's software will extract data from its existing system or an electronic Form I-9 and transmit the information to government databases. USCIS offers information needed to develop and test the software interface.

Please see the full FAQs here, as well as our earlier Client Alerts (found here and here).

**STEM Extension of Optional Practical Training**

The USCIS continues to allow foreign nationals to extend their post-graduation Optional Practical Training (OPT) work authorization, provided they will work for an employer that has registered with the E-Verify work authorization system. To date, enrollment is still optional for most U.S. employers.

STEM stands for "Science, Technology, Engineering, and Math." Only individuals currently employed using OPT based on a degree in one of those disciplines, and who are working in jobs that are in a STEM field, qualify for this special 17 additional months of OPT employment.

To qualify for a STEM extension of OPT, a foreign national will need to do the following:

1. Obtain his or her employer's E-Verify Company Identification Number. The foreign national employee's Designated School Official for immigration purposes will need to enter this number onto the new Form I-765 (application for an Employment Authorization Document, or EAD). The employer should provide this information in the form of an employment offer letter, covering the intended period of additional OPT employment with the company. The letter should also include a statement of how the

position is related to the STEM field, and state that the employer will notify the Department of Homeland Security if the OPT employment ends prior to the expected end date provided in the letter.
2. Once the letter is drafted, bring it to his or her Designated School Official, who will assist in completing a new Form I-765. The official will also issue a new Form I-20, annotated to reflect the additional period of approved OPT. Typically schools are able to provide a new I-20, with a recommendation e-mail from the USCIS regarding the STEM extension, within three to four weeks.

Employees must make their STEM extension applications prior to the end of their current period of OPT and EAD expiration date. If they do not receive their new STEM EADs prior to their current expiration date, they can continue to work with their employers for a period of up to 180 days while waiting for the new EAD to issue.

**New Massachusetts Law Protecting Private Information**

On March 1, 2010, Massachusetts' Standards for the Protection of Personal Information of Residents of the Commonwealth, 201 CMR 17.00 (the "Regulations") took effect, requiring businesses to be compliant with security safeguards for personal information of Massachusetts residents.

Generally, the Regulations mandate that any entity that stores personal information (a combination of name and Social Security number, bank account number, or credit card number) of Massachusetts residents must encrypt the information when the information is stored on portable devices, or transmitted wirelessly or on public networks.

In order to safeguard clients' personal information when transmitting forms for signature electronically, Mintz Levin's Immigration Practice is purposely excluding this personal information, specifically Social Security numbers and passport numbers, from these documents. This will avoid the need to encrypt this information.

Once the forms are returned to our attention, we will add in the missing information so that the applications will not be rejected by USCIS for being incomplete.

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For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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