Immigration Advisory

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Immigration News Updates

FY 2012 H-1B Quota Opens on April 1, 2011: New H-1B Petitions and Alternatives When H-1Bs Are Unavailable

U.S. Citizenship & Immigration Services (USCIS) will begin to accept fiscal year (FY) 2012 H-1B petitions on April 1, 2011, for H-1B positions with start dates of October 1, 2011, which is when the next U.S. government fiscal year begins. This year there is not an urgent need to file on opening day as the total number of H-1B visas will not be exhausted immediately. Yet it is important to be thinking about the timing of H-1B petitions, and alternatives to consider when there are no H-1B visas available.

As we have informed you in the past, Congress has placed a numerical "cap," or limit, on H-1B visas of 58,200 each fiscal year, with an additional 20,000 reserved for applicants holding U.S. master's degrees or higher.

While recently the cap has not been hit until the winter months, we have seen an upturn in H-1B filings and believe this year's H-1B quota will be exhausted sooner than during the last two years.

If you have responsibility for your firm's immigration planning and processing and you have already identified H-1B candidates (such as those employees in F-1 Optional Practical Training status or J-1 Academic Training, or L-1 employees who may need to pursue a PERM Labor Certification for permanent residency), please initiate the H-1B petition process as soon as possible.

Cap-Exemptions and Alternatives to the H-1B

While we expect H-1B visas to remain available for many months, it is important to consider other options available for obtaining work authorization.

First: Be certain that the foreign national you want to hire is in fact subject to the annual cap. Anyone who has been granted an H-1B in the past six years and who has already been counted against an annual cap is not subject to another annual cap. Also, universities, government research organizations, and nonprofit entities that are "affiliated" with universities are not subject to the annual cap. In addition, if a foreign national worker already has a cap-exempt H-1B, he or she may concurrently have a second H-1B with a company that would otherwise be subject to the cap.

Second: If an exemption to the cap is not possible, other visa classifications such as TN, E-1/ E-2, E-3, F-1, J-1, and O-1 must be considered.

TN Work Status for Canadians and Mexicans

Citizens of Canada and Mexico are eligible for TN work status under the North American Free Trade Agreement (NAFTA). The list of acceptable professions is more limited than for the H-1B, but assuming a Canadian or Mexican qualifies, adjudication

of the TN application can be accomplished quickly.

E-1/E-2 Treaty Trader Investor Status

For U.S. companies owned by nationals of countries with certain treaty relationships with the Unites States, the E-1 or E-2 work visa status may be an option. Most western European countries, Mexico, Canada, and others meet the treaty requirement for this option. If the U.S. company is owned by nationals of those qualifying treaty countries and is involved in substantial trade primarily (over 50%) with the treaty country (E-1) or has received a substantial investment from nationals of the treaty country (E-2), foreign nationals with the same nationality as the treaty country may qualify as either a manager or essential employee of the U.S. company. These applications require extensive documentation and typically require adjudication at a U.S. consulate abroad. However, once the U.S. company has qualified as an E-1 trader or E-2 investor company, subsequent applications for new employees are streamlined at the U.S. consulate, requiring only documentation of the qualifications of the prospective employee.

E-3: Specialty Occupation Professionals from Australia

Like the H-1B, the E-3 requires that the foreign national is coming to the United States solely to perform services in a specialty occupation. Unlike the H-1B, there is no cap and no maximum limit on renewals. This visa category requires the approval of a Labor Condition Application (LCA) as well as evidence that the foreign national has a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States. But unlike the H-1B visa, the E-3 visa does not require approval of a visa petition by USCIS. Instead, the E-3 visa applicant is entitled to apply for the visa directly at a U.S. Consulate. Therefore, the E-3 visa can be obtained relatively quickly.

F-1 Optional Practical Training—STEM Extension

USCIS continues to allow foreign nationals to extend their post-graduation Optional Practical Training (OPT) work authorization, as long as the F-1 student has graduated from a U.S. institution with a degree in a STEM field (science, technology, engineering, or math) and will work in a STEM occupation for an employer that has registered with the E-Verify work authorization system. E-Verify is a government database maintained by USCIS and the Social Security Administration, designed to ensure the lawful employment status of workers in the United States.

J-1 Trainee/Intern

Attendees or recent graduates of overseas colleges or universities may qualify for a J-1 trainee or intern visa. All J-1s require a U.S. program sponsor. Becoming a program sponsor is a lengthy and complicated process beyond the needs of most U.S. employers. However, there are many program sponsor companies in the United States that specialize in placing foreign nationals with U.S. companies to provide on-the-job training that meets the criteria for a J-1 trainee or intern. U.S. employers must file a detailed training plan with the program sponsor and all program sponsors charge a fee for this service. Most program sponsors act on the application within a week or two and forward the appropriate documents for the J-1 visa application to the foreign national in his or her home country.

O-1 Individuals with Extraordinary Ability or Achievement

This classification is for those who are one of the small percentage who have risen to the very top of their field of endeavor. The petitioner must be able to show the foreign national has sustained national or international acclaim and recognition for his or her

achievements.

Third: Check family relationships. If a spouse of the foreign national has J-1, L-1, E-1, or E-2 status, then the applicant may be entitled to an employment authorization document (EAD). Perhaps the spouse can move into one of these categories.

Fourth: Temporary Solutions. Under certain circumstances, employees of foreign companies rendering professional-level services to a U.S. company may enter the United States under what is known as a "B-1 in lieu of H-1B visa." This special B-1 visa must be specifically annotated by a U.S. consulate abroad. It requires, among other things, a showing that the B-1 visa holder would otherwise qualify for H-1B status, but is coming to the United States for a relatively short period (under six months), will remain on the overseas payroll at all times, and will receive no direct remuneration from any U.S. source. While many business visitors would not be entitled to B-1 in lieu of H-1B status, there are plenty of scenarios and circumstances where this visa category may be completely appropriate.

The above options do not completely fill the void for professional-level foreign workers impacted by the H-1B cap. But in the right situation, one of these options could be critical to the ongoing success of a project and these options should not be overlooked as alternatives to the H-1B visa.

An Increase in I-9 Audits

In concert with the overall trend in increased immigration enforcement measures, Immigration and Customs Enforcement (ICE) has announced an increase in and greater formalization of I-9 audits. John Morton, chief of U.S. Immigration and Customs Enforcement, recently announced the establishment of an audit office, the Employment Compliance Inspection Center. Morton noted that this office will "address a need to conduct audits of even the largest employers with a very large number of employees." The center is slated to be staffed with specialists to pore over I-9 files from companies targeted for audits.

Enforcement activity under the Bush administration focused on high-profile raids involving large numbers of undocumented workers being detained and deported, with less emphasis on criminal and civil penalties against employers. However, under the Obama administration, the main tool has been the I-9 audit, sometimes referred to as "silent raids," with an increased emphasis on employer liability, including criminal liability for company executives, managers, and human resource personnel. Notably, the 2009 Federal Worksite Enforcement Strategies lists criminal prosecution of employers as the first and highest of three priorities, with civil fines/penalties and removal of unlawful workers as the remaining two priorities.

ICE initiates I-9 audits by the issuance of a NOI (Notice of Inspection). Since January 2009, ICE has audited more than 3,200 employers, debarred 225 companies and individuals from federal contracting, and imposed more than $50 million in financial sanctions, more than during the entire previous administration. Fines alone levied against employers have increased from approximately $1 million in 2009 to a record $7 million in fiscal year 2010.

Substantial fines and criminal prosecutions of individuals within large companies have occurred in various high profile cases. However, critics have said that to date, the I-9 efforts have primarily penalized smaller employers, without equally targeting larger employers. Obama's 2012 budget called for an increase in funds to USCIS and ICE, with a greater proportion of funds channeled towards ICE. The new audit office, Morton said, would have the "express purpose" of providing support to regional immigration offices conducting large audits. "We wouldn't be limited by the size of a company," Morton said.

As companies are aware, all employers are required to complete Form I-9 for each employee hired after November 6, 1986 to work in the United States. To complete the form, employers must review and record the individual's identity and employment authorization document(s) and determine whether the document(s) reasonably appear to be authentic and related to the individual. The newest (and only

acceptable) edition of the form and an updated M-274, *Handbook for Employers, Instructions for Completing the Form I-9* are available as downloadable PDFs at www.uscis.gov.

Employers in violation of employment eligibility and verification laws can face various punishments, ranging from fines to criminal charges. Indeed it is more important than ever for companies to have clear and proactive immigration compliance policies and programs. Mintz Levin works closely with clients to establish and maintain such measures and we encourage you to contact us so we can assist you in developing and implementing these—if they are not already in place.

New USCIS Business Verification Tool Prompts Closer Scrutiny for Employers

On January 28, 2011, U.S. Citizenship and Immigration Services (USCIS) started testing a new database to validate information about U.S. employers filing petitions for employment-based immigration benefits. The web-based Validation Instrument for Business Enterprises (VIBE) uses commercially available data from Dun & Bradstreet (D&B) to validate information about companies or organizations, including the following:

- Business activities, such as type of business, trade payment information, and status (active or inactive);
- Financial standing, including sales volume and credit standing;
- Number of employees, including on-site and globally;
- Relationships with other entities, including foreign affiliates;
- Status (for example, whether it is a single entity, branch, subsidiary, or headquarters);
- Ownership and legal status, such as LLC, partnership, or corporation;
- Company executives;
- Date of establishment as a business entity; and
- Current physical address of headquarters or any of the company's offices.

During the testing phase, USCIS is consulting the VIBE database when initial documentation does not sufficiently address the required evidence for approval. However, our experience since this process started indicates it is verifying information provided in the petitions against the VIBE information even when initial documentation is sufficient for approval. USCIS has stated it will not deny a petition based on information from the VIBE database without first giving a petitioner the opportunity to respond to USCIS's concerns. USCIS is issuing Requests for Evidence (RFE) or Notices of Intent to Deny (NOID) to resolve any inconsistencies that arise upon review of the VIBE data. These inconsistencies, in our experience, have been as minor as a suite number in the address line that does not match the suite number listed in the D&B database.

As the information in the VIBE database comes through D&B, we strongly encourage all employers to check their D&B profiles to make sure *all the information is correct* prior to filing visa petitions with USCIS. Employers can update their D&B profile as needed through one of the following methods:

- By telephone by calling 1-800-234-DUNS (3867), or
- Online at www.dnb.com. There is a link to "Update Your D&B Profile" that provides a secure process for updating business information directly and correcting inconsistencies.

D&B will verify all updated information and include verified information in the D&B customer record within 72 hours. Please note that there is no fee to update this information. We advise employers to maintain records of their efforts to update their profiles as this can help in responding to requests from USCIS.

If you have any questions about this alert, please contact your Mintz Levin attorney or one of our

Immigration attorneys.

Updated Employer Handbook for I-9 Employment Eligibility Verification

In January 2011, U.S. Citizenship and Immigration Services (USCIS) issued an updated *Handbook for Employers*, providing revised instructions for completing Form I-9. Since 1986, all employers in the United States have been required to complete an Employment Eligibility Verification Form (Form I–9) for each newly hired employee to verify the employee's identity and employment authorization.

USCIS's newly revised *Handbook for Employers* provides important clarifications from prior versions, including instructions for I-9 completion in the following situations:

H-1B employees "porting" to a new employer

The new handbook states that an H-1B employee changing—or "porting"—to a new employer, may begin working for the new employer as soon as the new H-1B petition is received by USCIS, but that I-9 processing does not require presentation of the I-797 Receipt Notice. The handbook indicates that the H-1B employee's Form I-94 issued for employment with the previous employer and the employee's foreign passport qualify as List A documents, and that the employer should simply specify "AC-21" and record the date the new H-1B petition was filed in the margin of Form I-9 next to Section 2. Prior versions of the handbook did not address how to complete the I-9 for employees hired pursuant to H-1B portability.

F-1 students changing to H-1B status who are eligible for the "cap-gap" extension of status and employment authorization

While it is helpful that the revised handbook addresses how to complete Form I-9 for F-1 students with OPT employment authorization who are eligible for the "cap-gap" extension, the handbook is inconsistent with USCIS regulations and prior policy in one important respect. USCIS regulations provide for *automatic* extension of employment authorization for "cap-gap" eligible students, while the handbook indicates that an I-20, endorsed for the "cap-gap" extension, is required to complete the I-9 in this situation. Although the regulations do not require an endorsed I-20 for "cap-gap" extension of employment authorization, schools will typically issue an I-20 at the request of the student if evidence of employment authorization is needed.

Other improvements

The new handbook provides expanded guidance on completing I-9s for lawful permanent residents, refugees and asylees, individuals in Temporary Protected Status (TPS), and foreign students and exchange visitors. The revised handbook also includes updated information on the electronic completion and storage of I-9 documents, and it includes several new sample documents.

Employers will find the new handbook helpful, particularly with respect to navigating complex I-9 situations for which instructions were previously unavailable.

USCIS Announces Proposed H-1B Electronic Registration System to Reduce Costs for U.S. Businesses

On March 3, 2011, USCIS published a proposed rule that could save U.S. businesses more than $23 million over the next 10 years by establishing an advance registration process for U.S. employers seeking to file H-1B petitions for foreign workers in specialty occupations. The proposed electronic system is expected to minimize administrative burdens and expenses related to the H-1B petition

process—including reducing the need for employers to submit petitions for which visas would not be available under the statutory visa cap. Under the proposed rule, employers seeking to petition for H-1B workers subject to the statutory cap would register electronically with USCIS—a process that would take an estimated 30 minutes to complete. Before the petition filing period begins, USCIS would select the number of registrations predicted to exhaust all available visas. Employers would then file petitions only for the selected registrations. The registration system would save employers the effort and expense of filing H-1B petitions, as well as Labor Condition Applications, for workers who would be unable to obtain visas under the statutory cap.

The proposed rule is currently under a 60-day public comment period that started on the date of publication, March 3, 2011. Once that 60-day period has expired, USCIS will review and analyze comments and publish a final rule, which should include an implementation date.

New Export Control Certification by H-1B, L-1, and O-1 Petitioners

Effective February 20, 2011, U.S. Department of Homeland Security imposed a *new* requirement—albeit based on a law that has been in place since 1994—on those petitioners seeking the services of H-1B, L-1, and O-1 nonimmigrants. As implemented, a "Certification Required Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States" must be made by affected petitioners at Part 6 (Page 5) of Form I-129, Petition for a Nonimmigrant Worker. This new certification relates to the "deemed export" rule in the U.S. export laws, which provides, in essence, that the sharing of export-controlled technology or source code with a foreign national (including a foreign national employee) is also an export, regardless of the fact that the transfer takes place within the United States. Under this "deemed export" rule, a transfer of such export-controlled technology or technical data is "deemed" to be an export to the home country of the foreign national—and if an export license would otherwise be required to make an actual shipment of such technology or technical data out of the United States to that home country, an export license is required for the foreign national employee *before* any "release" of such technology or technical data. A "release" is through any visual inspection (as with technical specifications, blueprints, plans, etc.), oral communications, or when it is made available by practice or application under the guidance of persons with knowledge of the technology. In the I-129 petition, petitioners are called upon (under penalties of perjury) to confirm that they have reviewed the U.S. Department of Commerce's (USDOC) Export Administration Regulations (the EAR), and the U.S. Department of State's (USDOS) International Traffic in Arms Regulations (the ITAR), and that either (1) a license is not required, or (2) a license is required and the petitioner will prevent the foreign national from having access to such technology or technical data until such time as a USDOC—or USDOS-issued license—"or other authorization to release it" has been obtained.

What should affected petitioners know about the regulations underlying this new obligation? They are detailed, highly technical, and voluminous. And while this new certification obligation applies only to all H-1B, L-1, and O-1 petitioners, not all such petitioners work with technology or technical data that is considered to be "controlled," and the deemed export rule applies to any foreign national, not only to H-1B, L-1, and O-1 petitioners. For this reason, all affected petitioners ought to obtain the assistance of an expert in the area of export controls and the EAR/ITAR regulations not only for the specific purpose of determining how to answer the new questions on the I-129 form, but also to determine potential export licensing obligations with respect to other foreign national employees. Mintz Levin's Export Control attorneys are available to assist our clients regarding this issue.

Two notes of caution. The first is that responsible immigration law practitioners will be asking petitioners to provide a letter, opinion, or some form of confirmation-for-the-record upon which the petitioner's certification is based. Second, if in the course of attempting to ascertain if a prospective beneficiary will have access to controlled technology/data it is learned that a beneficiary for whom H-1B, L-1, or O-1 status has already been obtained does have access to such technology/data, it is

incumbent upon that petitioner to seek to rectify the oversight (e.g., by obtaining the requisite USDOC or USDOS license) immediately, rather than electing to wait until such time as that beneficiary is next scheduled to have an extension filed on his/her behalf. Mindful of the potential consequences, all affected petitioners would be well advised to obtain, proactively, a written analysis from an export controls expert in anticipation of future filings.

On January 20, 2011, Mintz Levin hosted a webinar entitled “Export Licenses—What you need to know for compliance.” If you would like to access the webinar recording, please click here.

Click here to view Mintz Levin’s Immigration attorneys.

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