Dinsmore & Shohl LLP
ATTORNEYS

Immigration Insights (August 2010)

August 31, 2010

US State Department Now Contacting Employers Filing Work Visa Petitions

A year ago, we reported on "site visits" conducted by U.S. Citizenship and Immigration Services (USCIS) contractors to verify the facts contained in H-1B temporary worker petitions filed by employers. Click here for our September 2009 *Immigration Insights* report. Now, the U.S. Department of State (DOS), which operates the U.S. consulates and embassies that issue visas to foreign nationals, is conducting its own telephonic contact with employers who have filed petitions in order to verify representations contained in employers' petitions.

The kinds of petitions impacted include H-1B, H-2, H-3 (Temporary Worker or Trainee), L-1 (Intracompany Transferee), O-1 (Extraordinary Ability), and P-1 Professional Athlete or Entertainer.

Background

Employers seeking to sponsor a foreign national in one of the above classes must first file a petition with USCIS. If USCIS approves the employer's petition, USCIS forwards a duplicate copy of the petition to the U.S. Department of State (DOS)'s Kentucky Consular Center (KCC). The KCC is responsible for inputting data into a database that U.S. consulates and embassies must tap into before issuing a visa to the sponsored foreign national. The KCC's database is the primary source of evidence used by consular officers to determine nonimmigrant petition approval. In addition to information related to the petition, many KCC database records also contain information from DOS' Fraud Prevention Unit. The Fraud Prevention Unit performs research on employers on a random basis and verifies factual aspects related to the foreign national and the proposed U.S. employment.

What DOS and the KCC are Doing

DOS has decided to create a base petitioner record in the KCC database for all first time employers or "petitioners." To create this base petitioner record, the KCC verifies petitioner information contained in the petition as filed with USCIS including, but not limited to, review of the company website, company contact information, and use of Google earth to confirm that an office exists in an appropriate physical location. Once the base petitioner record is complete, the KCC will not normally re-verify the petitioner information for two years.

Foreign National or Beneficiary Reviews

DOS also has initiated a pilot program to verify information related to foreign national beneficiaries and their proposed U.S. employment. These checks are random and are primarily completed through telephonic contact with the sponsoring employer. Telephonic contact by KCC is unannounced and should be anticipated to occur shortly after the petition is transferred to the KCC from USCIS. Once the beneficiary review is completed, the findings normally are finalized within two days and then made available to U.S. consular officers. Consular officers are instructed to review the report, question the foreign national regarding any discrepancies, and ask that the KCC correct any information if a finding was in error. If the discrepancies

were not in error, the consular officer will provide additional information to the KCC to update the report to include any additional incriminating evidence discovered during the course of the visa interview of the foreign national.

The KCC has designated 15 contractors to conduct telephonic beneficiary reviews with sponsoring employers. These contractors contact employers (petitioners) and request to speak to an authorized company official. They then ask a series of questions verifying certain information contained in the approved visa petitions. These questions include, but are not limited to:

1. Whether the petitioner, in fact, submitted the petition;
2. When the petitioner was established;
3. Physical location of the petitioner;
4. Number of employees;
5. Names of shareholders;
6. Location of Attorney of Record;
7. General information regarding the petitioner's operations and business plan.

Practice Pointers for KCC Telephonic Reviews

- Employers should ensure that they have designated a company representative to be contacted in the event of a random telephonic inquiry from the KCC.
- Employers should promptly notify their immigration counsel of the KCC contact and, if possible, should have counsel on the line when the employer speaks with the KCC contractor.
- Employers should request the name of the KCC contractor and confirm the credentials of the contractor with the KCC before providing any information. Confirmation may be obtained by contacting the KCC at (606) 526-7500. (There are multiple governmental agencies that may audit the petition. Therefore, it is critical that employers determine which agency they are providing information to in the event follow up is needed.)
- Employers should not to speak with government agents or contractors without a witness present. If counsel is not part of the conversation with the KCC, both the witness and the employer representative should prepare notes of what transpired during the telephonic interview, label the notes "Privileged and Confidential/Prepared at the Direction of Counsel," and submit their notes to counsel for review and retention.
- Employers should retain complete copies of their USCIS-filed petitions and supporting documents in a confidential file maintained by the designated company official. Should the company elect to submit to the telephonic interview by the KCC contractor, the designated official should retrieve this documentation and review it prior to speaking with the KCC contractor.
- If the KCC contractor requests information from the employer and the employer cannot provide accurate information without further research, the employer should indicate this to the KCC contractor. The employer should not "guess" about any information provided during the call. If the employer is unsure about some requested information, the employer may want to indicate that he/she will follow up with the KCC contractor to provide accurate information after such information is obtained. This is especially important for representatives who do not have access to information being requested by the KCC contractor, and there are no other company representatives available to answer the questions during the unannounced telephonic contact.
- Employers should remember that any derogatory information obtained during the telephonic contact and subsequent visa interview abroad could be used regarding a previously approved petition in the post-adjudication process, and/or could be referred to USCIS and/or U.S. Immigration and Customs Enforcement for further investigation, which could lead to civil penalties or criminal prosecution.

USCIS Statistics Show Troubling Adjudication Disparities

U.S. Citizenship and Immigration Services (USCIS) operates four Service Centers that adjudicate applications and petitions filed by employers and individuals. These applications and petitions seek immigration benefits under the Immigration and Nationality Act. The California Service Center (in Laguna Niguel, Calif.) and the Vermont Service Center (in St. Albans, Vt.) adjudicate H-1B Specialty Occupation, L-1 Intracompany Transferee, O-1 Extraordinary Ability, and P-1 Professional Athlete/Artist/Entertainer petitions (among others). Statistics recently obtained by *The Los Angeles Times* reflect some disturbing inconsistencies in each Center's approval, denial and request-for-evidence rates regarding H-1B, L-1, O-1, and P-1 adjudications.

For example, in the current fiscal year, the percentage of L-1 cases denied by the California Service Center (CSC) – 26.7% – is more than twice that of the Vermont Service Center (VSC)'s 10.4%. Similarly, the CSC issued more than twice as many requests for evidence (RFEs) in L-1 cases as compared with the VSC. A surprising 40% of L-1 cases filed with the CSC trigger an RFE.

O-1 and P-1 cases fair just as poorly at the CSC. In the current fiscal year, the CSC's O-1 denial rate is running at 19.6%; the VSC's is just 5.5%. Whereas the VSC issued RFEs in 16.4% of the O-1 cases it reviewed, the CSC issued RFEs in 37.5%. The disparity in P-1 cases is even more shocking: the CSC issued RFEs in a whopping 44.3% of P-1 cases it reviewed and denied 26.8%; the VSC issued RFEs in 14.9% and denied only 3.9%.

The full statistical tables for FY 2008, FY 2009, and FY 2010 (through July 2010) can be viewed here. The *Los Angeles Times* article is available here.

Fee Increase for Certain H-1B and L-1 Petitioners

Effective August 14, 2010, a new law imposes a significant fee increase for certain H-1B and L-1 petitioners. This new law will not affect the majority of employers of foreign workers. However, *for those employers who have (1) more than 50 employees and (2) more than 50% of their employees working on H-1B, L-1 or L-2 visas*, the law requires that for initial grants of nonimmigrant status and for change of employer cases the employer must pay an additional $2,000 fee for an H-1B case and an additional $2,250 for an L-1 petition. We strongly recommend that employers consult with counsel regarding the applicability of this new law, as most companies will not be subject to this fee increase.

New Regulations on Form I-9 Electronic Storage and Completion -- What Must Employers Do?

The Department of Homeland Security (DHS) recently published a final rule (a regulation) relating to signatures and storage of electronic I-9 forms. Important information for employers regarding this new rule are:

- *I-9 Completion in 3 Business Days.* Employers have three "business days" to complete Section 2 of the I-9 (the section of the form where the employer reviews the new hire's documents and verifies the new hire's authorization to work). For most employers, this means that weekend days and

federal holidays will not count. However, retailers and other employers who ordinarily conduct business on weekends will want to count weekend days as business days.

- *Employers May Use Combined Systems of Paper and Electronic I-9s.* Employers who wish to implement an electronic I-9 system need not do so at all locations to comply with the I-9 rule. Employers may use an electronic system at one location and maintain paper records at another. Similarly, employers using an electronic I-9 system are not required to move all of their I-9s for terminated employees into the electronic system.
- *Employers May Change Electronic Storage Systems.* Employers have the flexibility to change from one storage system to another, as long as the new system is still compliant with the system requirements described in the regulation.
- *Employers Need Not Maintain Audit Trails for Viewing Electronic I-9s.* While employers still must maintain audit trails for the creation, completion, updating, modification, alteration and correction of electronic I-9s, no audit trail is needed for an instance where someone is merely viewing the document.
- *Employers Must Provide the Employee with a Receipt/Transaction Record if Asked.* Employers must provide an employee with a transaction record, such as a printed copy of the I-9, if the employee requests it.

We recommend that employers who are considering a transition from paper to electronic I-9 completion and storage consult with counsel to discuss the electronic I-9 requirements before implementing a new system.

Visa Waiver Program's ESTA System Now Requires a Fee

Since January 2009, nonimmigrants from 36 designated countries who wish to enter the United States as visitors under the Visa Waiver Program must obtain travel authorization through the Electronic System for Travel Authorization (ESTA), operated by the Department of Homeland Security, before departing for the United States. Effective September 8, 2010, VWP travelers must pay a fee of $14.00 when applying for ESTA clearance, payable by credit card.

H-1B Category Remains Open

U.S. Citizenship and Immigration Services (USCIS) has released the latest numbers relating to the volume of H-1B specialty occupation visa petitions that it has received, requesting approvals during the H-1B 2011 Fiscal Year.

	Annual Limit	Petitions Filed as of August 13, 2010
"Regular" Cap-Subject	65,000	34,900
U.S. Graduate Degree Exemption	20,000	13,000

Employers commonly use the H-1B category to hire professionals who have unique skill sets or education in hard to find niches including but not limited to sectors of the scientific, engineering, computer science, finance, or marketing fields. H-1B extension petitions are not subject to the H-1B cap, and some employers, such as colleges and universities, are exempt from the H-1B annual limits entirely.

September 2010 Visa Bulletin -- EB-2 and EB-3 Categories Advance

The U.S. State Department (DOS)'s September Visa Bulletin reflects some movement in the permanent resident or "green card" Employment Second Preference (EB2) and Third Preference (EB3) categories. The EB2 "all chargeability" category remains current. The cutoff date for EB2 India advances nine weeks to May 8, 2006, and the cutoff date for EB2 China also advances to May 8, 2006. The EB3 all-chargeability advances 6½ months to December 15, 2004, and EB3 China advances four weeks to October 22, 2003. The cutoff date for EB-3 India remains unchanged at January 1, 2002. The Employment First Preference category remains current across-the-board.