

Alerts and Updates

SIGNIFICANT JUMP IN H-1B VISA PETITIONS AND OTHER DEVELOPMENTS IN IMMIGRATION

LAW

November 17, 2009

Immigration Update on H-1B Petitions; Visa Availability; INA Section 221(g) Notices and ESTA Registration; PERM Applications; FDNS H-1B Audits and Work-Site Visits

H-1B Petitions Jump

U.S. Citizenship and Immigration Services (USCIS) reports that as of November 6, 2009, it has received 54,700 H-1B petitions subject to the annual cap of 65,000. This is a significant jump since a report released on September 18, 2009, indicating that only 46,000 petitions had been received. The jump is attributed to reaching the cap on the additional 20,000 visas allotted for foreign nationals with advanced degrees and placing the remaining petitions for advanced-degree holders into the regular cap pool. Any H-1B petition filed on behalf of an individual with an advanced degree will now be counted toward the 65,000 cap. USCIS will continue to accept H-1B petitions until the cap is reached, taking into consideration that some of the petitions may be denied, revoked or withdrawn.

Employers may want to file any cap-subject H-1B petitions as soon as possible.

USCIS Temporarily Accepting H-1B Petitions Filed Without Labor Condition Applications

Responding to concerns from employers and beneficiaries of H-1B petitions over delays in filing caused by the recently implemented "iCERT" system, USCIS announced that it will temporarily accept H-1B petitions without certified Labor Condition Applications (LCAs), beginning on November 5, 2009, through March 4, 2010.

USCIS will only accept H-1B petitions without a certified LCA after seven calendar days have passed since the LCA was filed with the U.S. Department of Labor (DOL). The petition must be filed with a copy of the DOL's email giving notice of receipt of the LCA. Once the LCA is certified, it can be submitted to the USCIS only after the petitioner receives a request for evidence (RFE). Petitioners will then have a period of 30 calendar days to send in the DOL-certified LCA in response to the RFE. The H-1B petition will not be approved until the certified LCA is received.

Visa Availability

The U.S. Department of State recently released the December [Visa Bulletin](#), which reflects no changes to the availability of visas in the Employment-Based categories, other than a one-week advance in the Employment-Based Third Preference (EB-3) category, from April 22, 2001, to May 1, 2001. The EB-3 category encompasses those foreign nationals in positions that require at least a bachelor's degree or two or more years of experience.

INA Section 221(g) Consular Notices Must Be Disclosed as "Visa Denials" for ESTA Registrations

Prospective visitors to the United States seeking to enter under the Visa Waiver Program must first register with the U.S. Department of Homeland Security through the Electronic System for Travel Authorization (ESTA) online program. As part of this registration, applicants must answer whether they have ever been denied a U.S. visa. U.S. Customs and Border Protection (CBP)—an agency within the Department of Homeland Security—has advised that it will classify all Immigration and Nationality Act (INA) Section 221(g) notices as denials, even when the notice is due to consular administrative processing or security checks.

An INA Section 221(g) notice refers to the section of the INA that governs the standards for nonissuance of a visa. A Section 221(g) notice is issued by a U.S. consulate either when a visa application is refused, or when further administrative processing is required, or when background checks are incomplete.

When completing the ESTA, an applicant must now answer "yes" to the question "Have you ever been denied a U.S. visa or entry into the U.S. or had a U.S. visa cancelled?" if the applicant ever received such a notice, regardless of the reason why the notice was issued. CBP has advised that answering "yes" to this question will not automatically result in the denial of an ESTA application. The "yes" answer will trigger a manual review, which is supposed to be completed within 72 hours of submission. Applicants are also advised to state why the notice was issued in the space allotted to fill in where the visa was denied so that CBP can consider this information in its review. It appears that "denials" based on additional documentation would most likely result in an approved ESTA application.

CBP further advises applicants to complete a new ESTA application if they did not disclose a Section 221(g) notice, or if they received such a notice after receiving an approved ESTA. A new ESTA notice is required when there is a "material change" to an applicant's eligibility to enter the United States under the Visa Waiver Program. CBP considers the receipt of Section 221(g) notice a "material change. Visa waiver applicants who do not disclose a Section 221(g) notice as a "visa

denial" may be refused entry and, in the worst-case scenario, may be accused of fraud and become permanently inadmissible to the United States. Therefore, all Section 221(g) notices should be disclosed as a visa denial on the ESTA registration form.

PERM Applications' Rate of Resolution Still Low

The Department of Labor released a report indicating that as of June 30, 2009, only 17 percent of permanent labor certification (PERM) applications are resolved within six months of filing. This is a significant drop since September 2008, when 94 percent of applications were resolved in six months. The DOL notes that the 17-percent resolution rate is an improvement from the last quarter, when only 11 percent of applications were resolved within six months.

USCIS' Office of Fraud Detection and National Security Conducting H-1B Audits

The USCIS' Office of Fraud Detection and National Security (FDNS) has recently commenced an assessment of the H-1B program nationwide. As part of this effort, agents of the FDNS are conducting unannounced site visits to H-1B employers' principal places of business and work-site locations. During these visits, agents will seek to verify information contained in a specific H-1B petition. They may also ask to see paychecks, quarterly wage and tax reports and the employer's copy of the Form I-129 and supporting documentation filed as part of the H-1B petition. Currently, agents are not reviewing public-access files.

Employers visited by an agent of this program should consider asking for identification. If the agent asks to see where the H-1B beneficiary works, the agent can be guided to the work site, but employers can refuse to take the agent through restricted areas. Employers also have the right to have an attorney on the phone while the agent asks any questions of the employer or the beneficiary.

For Further Information

For more information about H-1B visas, ESTA registrations, PERM applications and the FDNS site visits and how to prepare for such a visit, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.