November 2011 Immigration Alert

****

I. H-1B Cap Will Be Reached Soon

On November 22, 2011, the U.S. Citizenship and Immigration Services ("USCIS") announced that, as of November 18, 2011, it had received 61,800 new petitions that count against the 65,000 standard H-1B cap, and all 20,000 H-1B petitions that count against the H-1B master's degree cap. The USCIS will continue to accept new H-1B petitions until it has received enough to fill the standard H-1B quota. We strongly urge employers to commence all new H-1B petitions as soon as possible if they want to have a chance to be included in this year's quota.

II. Holiday Alert for Foreign Travel

The holiday season often means increased international travel as Americans go on vacation and foreign nationals return home to see family and friends. Unfortunately, this

travel can be fraught with challenges if the proper precautions are not made. Americans need to make sure that they have whatever visas may be required and that their passports or other travel documents satisfy the requirement(s) of the countries that they will visit.

Foreign nationals must make sure that they have the visas, passports, and other documentation necessary to both enter their country of destination and return to the United States. Those foreign nationals who plan to apply for a new visa must be particularly careful because American embassies and consulates operate on holiday schedules and typically are short-staffed during the holiday season. In this regard, human resource managers should pay particular attention to the travel plans of foreign nationals to ensure that these employees will not run into difficulty and can return as planned.

III. BALCA Rejects DOL's Restrictive "Affiliation" Requirement and Expands Eligibility to ACWIA Wages for Hospitals and Other Health Care Facilities

On November 15, 2011, the Board of Alien Labor Certification Appeals ("BALCA") issued its decision in *Children's Hospital Corporation*, BALCA Case No. 2011-PER-01338 (Nov. 15, 2011). This involved an appeal by Children's Hospital from a decision by the U.S. Department of Labor's Employment and Training Administration, Office of Foreign Labor Certification, refusing to grant the hospital's request for a prevailing wage determination under the American Competitiveness and Workforce Improvement Act ("ACWIA") in connection with a Labor Certification Application that it planned to file for a foreign national employee it wanted to sponsor for permanent residence.

Children's Hospital sought eligibility for an ACWIA wage determination because it was more consistent with its compensation schedule for the sponsored position than the higher wages generally applicable to private employers. To demonstrate eligibility, Children's Hospital had to show that it was affiliated with a nonprofit institution of higher education under 20 CFR Section 565.40(e)(1). Children's Hospital established that it had a longstanding partnership with Harvard Medical School ("HMS") and claimed that the elements of this partnership satisfied the regulatory requirements for "affiliation." The certifying officer ("CO") rejected Children's Hospital's position because, among other reasons, HMS and Children's Hospital were distinct institutions, and their respective boards lacked the power to bind each entity. When its request for redetermination was also denied by the CO, Children's Hospital sought BALCA review.

BALCA indicated that the sole issue on appeal was "whether [Children's Hospital] is a nonprofit entity that is affiliated or related with the [HMS], and therefore eligible for a prevailing wage determination [under ACWIA]." After reviewing the governing statute and regulations, BALCA rejected the CO's conclusions and found that the evidence submitted by Children's Hospital reflected a "consistent collaboration" between the hospital and HMS, based on an established program and shared physical space, which satisfied the requirements for affiliation under the regulations. In this regard, BALCA also refused to accept the argument that the CO's definition of "affiliation" was

consistent with the ordinary meaning of that phrase. BALCA noted that Children's Hospital and HMS consistently referred to their relationship as an affiliation and that this was a common designation in the health care industry.

BALCA's decision in *Children's Hospital* promises to be important due to the ripple effect it may have on other immigration-related applications that rely on the concept of "affiliation" to define eligibility for benefits – including, most importantly, the exemption from the H-1B cap that nonprofit "affiliates" of institutions of higher education receive. Currently, the USCIS is reviewing a similarly restrictive definition that it has used to limit access to the H-1B cap exemption. The *Children's Hospital* decision may influence the USCIS to expand its policy.

IV. USCIS Adopts Procedures for "Bundling" L-1B Petitions Related to the Same Project

On November 3, 2011, the USCIS's Office of Public Engagement announced that the USCIS now will permit petitioning employers to "bundle" multiple L-1B petitions if they relate to eligible employees who will work on the same project and where the location and specialized knowledge duties of the employees also will be the same.

The USCIS indicated that it had taken this action because it recognized "that businesses often need to temporarily move multiple employees to the United States for particular projects which draw upon their specialized knowledge." While the USCIS's objectives may be well intentioned, we question whether it is wise for any employer to utilize this procedure, as it is not clear how the USCIS will adjudicate these petitions. In recent years, the USCIS has adopted an increasingly narrow definition of the "specialized knowledge" required to satisfy the L-1B eligibility requirements. In this context, employers who bundle their L-1B petitions could find that all are denied if the USCIS concludes that the specialized knowledge does not satisfy the regulations. At least with individual L-1B petitions, the USCIS must look at each case and adjudicate it on its respective merits.

We will continue to monitor the USCIS's actions in this area to see if the bundling initiative represents a real benefit or is actually a major trap for unwary employers.

V. ICE Issues a New Round of Form I-9 Audit Notices

The Obama administration has continued its stealth crackdown on employers by issuing audit notices to another 500 employers that seek access to their Form I-9 and other hiring records. The surge in these audits reflects the importance that this administration places on getting employers to comply with Form I-9 and other worksite obligations. During the last fiscal year, Immigration Customs Enforcement ("ICE"), the agency within the Department of Homeland Security responsible for worksite enforcement, issued close to 2,500 audit notices. This exceeds the previous year's total of nearly 2,200 audit notices. Since January 2009, when President Obama took office, ICE has conducted more than 5,900 audits.

These audits can result in civil fines and criminal penalties. Companies can be fined, barred from government contracts, subject to asset forfeitures, and indicted for criminal violations of the laws that prohibit employing undocumented workers or failing to pay taxes related to their employment.

VI. DOS Designates U.S. Consulate General in Chennai as Sole Post in India with Authorization to Process "Blanket L" Applications

On November 1, 2011, the U.S. State Department ("DOS") announced that the U.S. consulate in Chennai would become the sole acceptance center in India for all applications for intracompany transfers under the "blanket L" classification starting on December 1, 2011. On that date, the American embassy in New Delhi and the U.S. consulates in Mumbai, Kolkata, and Hyderabad will no longer accept or process these blanket L applications. This does not affect the applications by spouses and children for L-2 visas, which may still be processed at all posts in India.

VII. DOS Issues December 2011 Visa Bulletin

The DOS recently issued its Visa Bulletin for December 2011. The Visa Bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. The cutoff dates for the Employment-Based Third Preference category are as follows: January 15, 2006, for all chargeability, including the Philippines and Mexico; September 8, 2004, for China; and August 1, 2002, for India. The cutoff dates for the Employment-Based Second Preference category are as follows: Current for all chargeability, including Mexico, the Dominican Republic, and the Philippines; and March 15, 2008, for China and India. The DOS's monthly Visa Bulletin is available at: http://travel.state.gov/visa/bulletin/bulletin_1360.html.

For more information or questions regarding the above, please contact:

New York
Robert S. Groban, Jr.
212/351-4689
rgroban@ebglaw.com

New York
Pierre Georges Bonnefil
212/351-4687
pgbonnefil@ebglaw.com

Newark
Patrick G. Brady
973/639-8261
pbrady@ebglaw.com

San Francisco
Jang Im
415/398-3500
jim@ebglaw.com

Houston
Greta Ravitsky
713/300-3215
gravitsky@ebglaw.com