



March 2009

[Reminder: New H-1B Petitions Must Be Filed On March 31, 2009](#)

[USCIS Expands Premium Processing For Certain I-140 Petitions](#)

[USCIS Delays Implementation Of New Form I-9](#)

[Sanders-Grassley Amendment To Stimulus Bill Restricts New H-1B Petitions](#)

[DHS Delays Effective Date Of E-Verify Requirement For Government Contracts](#)

[Eleven People Arrested, And Indicted In Multi-State H-1B Fraud Operation](#)

[Oklahoma District Court Rules That State Constitution Bars Only One Provision of State Immigration Law](#)

[Upgraded Biometric Technology Facilitates Visitors' Entry To The United States](#)

[Congress Proposes To Extend E-Verify Through September 30, 2009](#)

[DOS Issues March 2009 Visa Bulletin](#)

I. Reminder: New H-1B Petitions Must Be Filed On March 31, 2009

The annual H-1B lottery season has arrived! For those of you new to this event, this means that all new H-1B petitions from non-cap exempt employers must be filed with the U.S. Citizenship and Immigration Services (USCIS) on March 31, 2009, to have a chance for inclusion in this year's lottery.

The lottery arises due to the quota that applies to new H-1B visas. Each fiscal year, the federal government is authorized by statute to approve only 65,000 new H-1B visas. An additional 20,000 H-1B visas are set aside for applicants who have master's degrees from accredited American universities. The federal government's new fiscal year for the H-1B quota begins on October 1, but the governing regulations permit employers to apply up to six months in advance.

CLIENT ALERT

If there are more applicants for new H-1B visas than the quota allows, the federal government conducts a “lottery.” The format for the lottery has varied over the past few years and has not been announced for this year. Generally, USCIS numbers H-1B petitions according to the date on which they arrive. Then, when the projected volume exceeds the quota, USCIS conducts a random lottery for all H-1B petitions properly filed on or before the date the quota was reached. **This is why all new H-1B petitions must be filed on March 31, 2009, so they arrive at USCIS on April 1, 2009, and are included in the random lottery.**

II. USCIS Expands Premium Processing For Certain I-140 Petitions

On February 24, 2009, USCIS announced that it would expand its premium processing service to certain I-140 petitions starting March 2, 2009. This expansion of premium processing service is limited. It applies only to I-140 petitions which, as of the premium processing request date, satisfy the following four conditions:

1. The I-140 petition falls in a category designated eligible for premium processing service;
2. The beneficiary of the I-140 petition has reached his/her six-year H-1B maximum stay or will reach that maximum stay within 60 days of the premium processing request;
3. The beneficiary is eligible for an extension of H-1B status only if the I-140 petition is approved; and
4. The beneficiary is not eligible to extend his/her H-1B status in any other way.

If the employee-beneficiary of a pending I-140 petition—or one that is about to be filed—does not satisfy all these requirements, then the I-140 petition is not eligible for premium processing.

III. USCIS Delays Implementation Of New Form I-9

On January 30, 2009, USCIS announced that it had delayed the effective date of the new Form I-9 until April 3, 2009. This new form originally was scheduled to take effect on February 2, 2009. The comment period on the new form now runs until March 4, 2009. The temporary extension is designed to provide the Department of Homeland Security (DHS) with an opportunity to further consider the interim final rule: "Documents Acceptable for Employment Verification" published by USCIS on December 17, 2008. USCIS also has announced that the prior version of the Form I-9 should be used until at least March 4, 2009.

IV. Sanders-Grassley Amendment To Stimulus Bill Restricts New H-1B Petitions

Buried in the new economic stimulus legislation signed by President Obama is a provision

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seeking to file new H-1B petitions if they have received funds from the Troubled Assets Relief Program (TARP).

The original text of the Sanders-Grassley amendment barred all recipients of TARP funding from hiring any H-1B workers. However, the amendment was modified so that employers who receive TARP funding can petition for new H-1B workers if they follow the rules prescribed for “H-1B Dependent Employers.” These rules require employers who have significant numbers of H-1B employees (as measured in proportion to the total workforce) to: (1) attest that they have made good-faith attempts to hire U.S. workers at prevailing wages (or industry-standard wages); (2) attest that their hiring of H-1B employees does not displace U.S. workers who have sought those same jobs; and (3) maintain records showing that they have complied with wage and other work condition standards. The bottom line is that the Sanders-Grassley amendment will make it much more difficult for employers who receive TARP funds to file new H-1B petitions because it will be hard for them to survive the enhanced recruiting requirements in this economy.

V. DHS Delays Effective Date Of E-Verify Requirement For Government Contracts

On January 30, 2009, the DHS announced that it had extended until May 21, 2009, the implementation of the rule requiring certain contractors to use the E-Verify employment eligibility verification system for employees working on federal government contracts.

VI. Eleven People Arrested, Indicted In Multi-State H-1B Fraud Operation

On February 11, 2009, the U.S. Immigration and Customs Enforcement (ICE) agents arrested eleven individuals in seven states as part of an investigation into suspected visa and mail fraud. A New Jersey Domestic Profit Corporation, Vision Systems Group Inc., with a branch office in Coon Rapids, Iowa, also was indicted in a ten-count federal indictment that included one count of conspiracy, eight counts of mail fraud, and one asset forfeiture count in the amount of \$7.4 million.

Matthew G. Whitaker, U.S. Attorney for the Southern District of Iowa, announced “Operation Pacific Vision” as the culmination of a multi-state investigation into H-1B fraud by federal, state and local law enforcement agencies in California, Iowa, Kentucky, Massachusetts, New Jersey, Pennsylvania, and Texas. The investigation involved companies that sponsor primarily H-1B non-immigrants. In filing their H-1B petitions, the target companies represented that they needed foreign workers to fill existing vacancies in the United States. According to the government, however, these companies did not always have jobs available for these workers and were forced to place them in non-pay status after their arrival here. In some cases, the H-1B workers allegedly were placed in jobs and locations not previously certified by the Department of Labor. This not only displaced qualified American workers, but also violated prevailing wage laws. As a result of these charges, the defendants face up to 20 years in prison and fines not exceeding \$250,000.

While Operation Pacific Vision began under the Bush administration, it is noteworthy that the

CLIENT ALERT

indictment was announced under the Obama administration. New DHS Secretary Napolitano has made it clear that DHS will continue to pursue aggressively employers who violate the immigration laws. Indeed, we believe that this aggressive enforcement stance may be the only way that the Obama administration can secure comprehensive immigration reform. For this reason, it would be wrong for employers to believe that worksite enforcement will be relaxed. To the contrary, it may be the price of comprehensive immigration reform.

VII. Oklahoma District Court Rules That State Constitution Bars Only One Provision of State Immigration Law

On February 11, 2009, Judge Jefferson D. Sellers of the Oklahoma District Court of Tulsa County ruled in *Thomas v. Henry* (No. CJ-2008-46, 2/11/09) that all provisions of the Oklahoma Taxpayer and Citizen Protection Act (H.B. 1804), an Oklahoma immigration law enacted in 2007, are constitutional under the state constitution except for one non-employment-related provision that bars immigrant GED holders from receiving resident tuition.

H.B. 1804 was scheduled to take effect on November 1, 2007. It provides criminal penalties for knowingly harboring illegal aliens, permits the denial of bail to arrested illegal immigrants, limits access to government IDs, and does away with public assistance to illegal immigrants. In his decision, Judge Sellers ruled that H.B. 1804 does not violate the provisions in the Oklahoma Constitution that ban establishment of a state Bureau of Immigration, or the provision that prohibits state legislation that encompasses more than one subject.

VIII. Upgraded Biometric Technology Facilitates Visitors' Entry To The United States

On January 15, 2009, DHS announced that upgraded biometric technology now was in place at major U.S. ports of entry, and most international visitors should expect to use the new technology when they enter the United States. The upgrade began in 2007, when DHS expanded its biometric technology from a two- to a ten-fingerprint collection standard. This was designed to make the entry process faster and more accurate, and allow DHS officials to focus their attention on people who may pose a risk to the United States.

The DHS maintains that collecting ten fingerprints significantly increases fingerprint matching accuracy and reduces the possibility of system misidentification. It also enhances DHS' ability to check visitors' fingerprints against the FBI and Department of Defense databases. The DHS also maintains that the use of biometrics has helped prevent the use of fraudulent documents, protects visitors from identity theft, and stops thousands of criminals and immigration violators from entering the United States.

IX. Congress Proposes To Extend E-Verify Through September 30, 2009

On February 25, 2009, the House of Representatives approved an Omnibus Appropriations bill (H.R. 1105) that included two immigration-related provisions. The first is a provision that extends E-Verify through September 30, 2009. Even though E-Verify—the federal

CLIENT ALERT

government's voluntary electronic employment verification program—is budgeted until September 30, 2009, it legally is scheduled to expire on March 6, 2009. The bill would extend E-Verify through the date it was funded. The second provision extends the E-5 investor program for foreign investors investing in a regional center through September 30, 2009. This program allows foreign nationals to obtain green cards if they invest substantial amounts in businesses that create jobs for Americans. One of the mechanisms for investment is through a regional center approved by USCIS for these purposes. This bill also extends authorization for these centers through September 30, 2009.

X. DOS Issues March 2009 Visa Bulletins

The DOS recently issued its Visa Bulletin for March 2009. This Bulletin determines who can apply for permanent residence and when. The results were mixed. Employment-Based Third Preference is available for all charge-ability areas and the cut-off date is May 1, 2005. Following are the additional cut-off dates: India—October 15, 2001, China—October 22, 2002, Mexico—August 1, 2003, and the Philippines—May 01, 2005. The Employment-Based Second Preference (“EB-2”) for Indian and Chinese nationals is available and the cut-off dates are February 15, 2005, and February 15, 2004, respectively. The monthly Visa Bulletin is available through the DOS web site at: http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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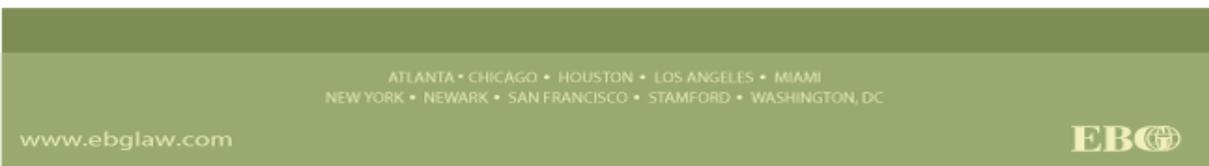
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