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IMMIGRATION LAW UPDATE

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Special points of interest:

- March 2007 Visa Bulletin
Published: www.state.gov
- FY 2008 H-1B visa filing period opens on April 1, 2007.
- Comprehensive Immigration Reform (CIR) legislation reportedly in the works—in the meantime ICE continues aggressive work-site enforcement.
- REAL ID Act facing opposition from states.

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“H-1B Season”: FY 2008 H-1B Visa Numbers Available on April 1st

It is that time of year again. Every year since the H-1B visa numbers regressed to a 66000 quota limit per Fiscal Year, there has been a scramble by employers and alien employees to obtain the precious few H-1B visa numbers that are available. In order to obtain one of the few FY 2008 H-1B visas, employers may file new H-1B visa applications starting on April 1, 2007 for a October 1, 2007 start date.

Employers are well advised to prepare now, if they have not already, for the rush. Last year (FY 2007), the H-1B visa quota was exhausted by mid-May after only approximately six weeks of visa availability. Therefore, in order to secure one of these visas, employers should identify candidates who will require new H-1B visas anytime during the next 18 months. If last year is the norm, employers will not see more H-1B visa numbers

until April 1, 2008 for a start date of October 1, 2008.

It is important to remember that the quota applies to new applicants only. An applicant who currently has an H-1B visa or who previously held H-1B status is not subject to the quota for new H-1B visas. Generally the quota is applicable to students who are hired directly out of college or graduate school, new hires from overseas or those changing status who have not had an H-1B previously.

As another Fiscal Year of H-1B visa madness is upon us, there is some hope that perhaps the H-1B quota will be expanded in the near future. On March 7th, Bill Gates, Chairman of Microsoft appeared before Congress and was questioned by Senator Edward Kennedy (D-MA) regarding Strengthening American Competitiveness in the 21st



April 1st is the first day for employers to file new H-1B visa applications for specialized workers.

Century. During these hearings Senator Kennedy noted: “There are not enough visas under current law to meet our need.”

REAL ID Act Continues to Face State Opposition

The REAL ID Act which Congress passed in May of 2005 contained a series of mandates that established new standards that the states must meet by May of 2008 if the state drivers license is to be accepted as a valid form of identification by the federal government.

Maine became the latest state to voice opposition to the REAL

ID Act (“Act”) when the Maine state legislature voted against the Act. Currently, Georgia, Massachusetts, Montana and Washington all have similar bills pending in their state legislatures with Arizona, Hawaii, Missouri, New Hampshire, New Mexico, Oklahoma, Utah, Vermont and Wyoming to soon file similar legislation. The crux of

the Maine opposition to the Act is the intrusion of privacy coupled with the belief that the country would not be any safer should the Act be followed. The Act is expected to cost states \$11 billion nationally and will link each states driver’s license database to a national database which could be an easy target for identity thieves.

BALCA Issues Another Decision on “Good-Faith Recruitment Effort”

Last month this column highlighted the need of employers to establish a good faith recruitment effort that includes diligently contacting applicants who apply for the position offered. The two cases discussed in this space were pre-PERM cases: *Matter of Ulead Systems*, 2006-INA-00019 (BALCA Jan. 10, 2007) and *Matter of Staffing Services*, 2005-INA-00062 (BALCA Jan. 10, 2007). Both cases resulted in affirmations by the Board of Alien Labor Certification Appeals (BALCA) of the underlying

denials by the Certifying Officers (CO).

Subsequently, BALCA has shed some light on what it considers to be a good-faith recruitment effort. In *Matter of Outback Steakhouse*, 2005-INA-00096 (BALCA Jan. 19, 2007), BALCA reversed the underlying CO denial where the employer had sent each responding applicant a letter by certified mail, return receipt requested, to the address on each resume and followed up with each applicant by making two telephone calls

to the number on the resumes. BALCA held that the employer does not have to make actual contact with the applicant to establish a good-faith recruitment effort. Rather, BALCA ruled that the employer's attempt to contact the applicants through two means of communication demonstrated a “good-faith effort.” However, it should be noted that BALCA found the employer's efforts were not “vigorous” and this could be a hint that this was a close decision.



Two means of communication, a certified letter and two telephone calls, were sufficient in this case to establish a good-faith recruitment effort.

Advance Parole: Know Your Immigration History Before You Go

Applicants with pending applications for adjustment of status can be eligible for permission to travel (advance parole) depending upon the immigration history of the applicant. Unfortunately, applicants often believe that simply because they have an application for adjustment of status pending that they are eligible for advance parole. Often the applicant will apply for advance parole and the application is granted. It is only upon return to the United

States that the true story unfolds. This was the case in *Ibragimov v. Gonzales*, 2007 WL 184661 (2nd Cir. 2007). Prior to filing for adjustment of status with an immigrant visa petition, the petitioner was a B-2 visa overstayer. Believing that the advance parole allowed him to travel because it was approved and issued by US Citizenship & Immigration Services (USCIS), the petitioner left the United States and returned only to be placed into immigra-

tion proceedings before the Immigration Judge as an arriving alien. This case illustrates a point that immigration attorneys try to drive home when discussing advance parole: applicants should always be forthcoming about their immigration history. Just because USCIS issues the advance parole document does not mean that Customs & Border Protection will allow admission to the US upon return: therefore, know your immigration history.

“Unfortunately, applicants often believe that simply because they have an application for adjustment of status pending that they are eligible for advance parole.”

March 2007 Visa Bulletin: The Frustration Continues

The March 2007 Visa Bulletin did little to improve the outlook for green card applicants who continue to be frustrated by the excessive wait for adjudication of their applications. The Department of State failed to move the EB visa numbers ahead in most categories. The only good news was that EB-1 and EB-2 remained current. Meanwhile EB-3 continued to remain stalled at August 1, 2002. This is the fourth month in a row that EB-3 has not

moved forward.

China, India, Mexico and the Philippines remained current in EB-1 but varied in EB-2 and EB-3. China EB-2 again failed to move from April 22, 2005 while China EB-3 also failed to move from August 1, 2002. India EB-2 remained at January 8, 2003 and India EB-3 also failed to move from May 8, 2001. Mexico and the Philippines remained current in EB-2. Mexico is at May 15, 2001 for

EB-3 while the Philippines is at August 1, 2002 for EB-3.

On the Family-Sponsored side the entire world, as well as China and India had the same visa numbers: F-1 is May 1, 2001; F-2A is March 22, 2002; F-2B is July 1, 1997; and F-3 March 1, 1999. F-4 varied with 1995/1996 dates. Mexico and the Philippines lagged well behind the above dates. As always the visa bulletin can be located online: www.state.gov.



The Visa Bulletin made no progress for employment-based applicants again in March.

ICE Continues with Aggressive Interior Enforcement

More than 200 illegal aliens who worked at 63 locations in 17 states as janitors were rounded up by US Immigration & Customs Enforcement (ICE) and arrested. The Washington Times reported. All of the illegal aliens were employees of Rosenbaum-Cunningham International, Inc. (RCI) a Florida-based cleaning contractor whose clients include Hard Rock Cafe, ESPN Zone, Planet Hollywood, Dave & Busters and the House of Blues restaurants. Some of the illegal aliens were arrested while working at

these restaurants.

In addition to the workers, RCI's two owners and the controller were indicted and arrested for conspiracy, fraud, tax crimes and other criminal violations. The investigation began 20 months ago according to ICE. ICE states that the restaurant chains paid RCI more than \$54.3 million for janitorial services from 2001–2005. Because RCI employed illegal aliens and failed to collect and pay federal income, Social Security, Medicare and

federal employment taxes on the wages it paid to its janitors, it managed to evade payment of \$18.6 million in taxes.

The Washington Times reported that the RCI officials face 15 years in prison and \$18 million in restitution fees if convicted.

The illegal aliens will likely be referred to an immigration judge to determine if they have any relief from removal from the United States. If not, they will be ordered removed to their country of nationality.



Immigration & Customs Enforcement continues the current trend of aggressive work-site enforcement against illegal aliens and their employers.

New Legislation Introduced

Several immigration-related bills have been introduced in the House and the Senate. Some of the more interesting bills are listed here. While the introduction of a bill in no way guarantees that it will become law, reviewing the bills does give some insight into where the House and Senate are in regard to the current immigration debate.

Representative Jose Serrano (D-NY) introduced H.R. 1176,

which is a bill to grant discretionary authority to an immigration judge to determine that an alien parent of a US citizen child should not be ordered removed, deported or excluded.

Senator Norm Coleman (R-Minn) introduced S. 646, which is a bill to increase the nursing workforce.

Senator Frank Lautenberg (D-NJ) introduced S. 615 which is

a bill to provide to spouses and children of nonimmigrant aliens who died in the September 11th terrorist attacks an opportunity to file to adjust their status to legal residence.

Senator George Voinovich (R-Ohio) introduced S. 653 which is a bill to expand the visa waiver program to other countries on a probationary basis.

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Western Hemisphere Travel Initiative Changes

In January this column reported the coming changes scheduled for January 23, 2007 that would require the presentation of a valid passport for all travelers from Canada, Mexico and Bermuda arriving in the United States due to the passage of the Western Hemisphere Travel Initiative (WHTI). Subsequently, WHTI has gone into effect. However, due to concerns voiced by many affected by WHTI, the Department of Homeland Security (DHS) an-

nounced that a rule will be proposed which would allow United States and Canadian citizen children ages 15 and younger to cross the border (land and sea) with parental consent, carrying a certified copy of their birth certificate instead of a passport. Additionally, United States and Canadian national children ages 16–18 who are traveling with school groups, religious groups, social/cultural organizations or athletic teams/organizations

would also be able to enter with a certified birth certificate and adult permission.

This softening of the WHTI rules for children in the mentioned limited circumstances, does not alter or change the current WHTI rules for all other travelers entering the United States. Therefore, all other travelers should continue to travel with a valid passport to insure entry to the United States.



Proposed changes to WHTI will affect children only. All others should continue to travel with a valid passport.

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Child Status Protection Act Update

The Child Status Protection Act ("CPSA"), which was enacted on August 6, 2002 to alleviate the harsh result of a child "aging out" (reaching the age of 21) during the waiting period for a visa to be approved or a visa number called, recently came under review at the Board of Immigration Appeals ("BIA").

In *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA Feb. 9, 2007) the BIA held that the CPSA applies to an applicant whose visa petition was approved before the August 6, 2002 enactment of the CPSA; even though the applicant filed the adjustment of status application after August 6, 2002, because the applicant was under 21 when the visa petition was filed. The BIA found that Congress had intended on including applicants



The intent of the Child Status Protection Act was to keep children from "aging-out" while awaiting agency action.

such as the one in *Avila-Perez*, who reached the age of 21 prior to the enactment of the

CPSA and who had an approved visa petition but had not filed the adjustment of status application. In short, the BIA found that the age-out protections of the CPSA extended to applicants with approved visa petitions who had yet to file an adjustment of status application as of August 6, 2002.

This is a significant ruling for child applicants who age-out during the course of the visa petition process. It is even more significant now with the retrogression and slow movement in so many of the family visa categories. Hopefully, this ruling will help more children qualify for adjustment of status under the CPSA and fulfill the intent of CPSA when it was enacted by Congress.