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US IMMIGRATION & NATIONALITY LAW

APRIL 2008 IMMIGRATION UPDATE

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April 2008 Immigration Update

Headlines:

- **1.** **Employers to File FY 2009 H-1B Petitions on April 1; USCIS Publishes Interim Rule Prohibiting Multiple H-1B Petitions for Same Employee** - The H-1B supply is expected to be exhausted immediately; USCIS published an interim final rule prohibiting employers from filing multiple H-1B petitions for the same employee.
- **2.** **DHS Issues No-Match Supplemental Proposed Rule; Public Comments Accepted Until April 25** - The agency seems determined to press ahead with its previously stated plans despite concerns about their potential negative impact.
- **3.** **USCIS Issues Guidance on H-1B Specialty Occupation Licensure Requirements** - USCIS issued guidance on H-1B petitions for specialty occupations when a required professional license cannot be obtained because of state licensing requirements mandating possession of a valid immigration document.
- **4.** **Biometrics Required for Re-Entry Permits and Refugee Travel Documents** - The revised I-131 instructions require applicants for re-entry permits and refugee travel documents to provide biometrics.
- **5.** **PERM Data Released** - More than 85,100 PERM cases were certified during FY 2007.
- **6.** **WHTI-Compliant Document To Be Required for Land, Sea Travel Into the U.S.** - Effective June 1, 2009, travelers will be required to present a passport or other approved secure document denoting citizenship and identity for all land and sea travel into the U.S.
- **7.** **Around the States: Rhode Island, Virginia Crackdowns; NYC Losing**

to Competition - Along with a reduction in undocumented residents, immigration crackdowns will have a substantial impact on legal residents and on the economy.

- **8. NYC Staffing Company Charged With Violating H-1B Program** - An investigation by the Department of Labor's Wage and Hour Division found that 156 H-1B workers from the Philippines, brought into the U.S. by Advanced Professional Marketing, Inc. (APMI), a medical staffing company, are owed almost $3 million in back wages.
- **9. Company Managers Indicted for Hiring Unauthorized Workers; E-Mails Used as Evidence** - In 2006, raids were conducted on 52 IFCO workshops, which revealed problems with the Social Security numbers of half of the company's 5,800 employees.
- **10. India Second Preference Visa Numbers Available in April; Iraqi, Afghani Translator Numbers Going Fast** - Visa numbers have once again become available to the India employment second preference category; the FY 2008 numerical limitation of 500 visas in the special immigrant translator category will be reached soon.
- **11. DHS Collecting 10 Fingerprints at JFK Airport** - JFK is the tenth port of entry to begin collecting 10 fingerprints from international visitors.
- **12. Hard Times Expected at Toronto Consulate** - The consulate expects a severe staffing shortage this summer.
- **13. Visa Waiver Agreements Signed With Eastern European Countries** - Visa waiver agreements have been signed with Slovakia, Hungary, Lithuania, Estonia, and Latvia, putting those countries on the path toward possible designation as Visa Waiver Program members later this year.

Details...

1. Employers to File FY 2009 H-1B Petitions on April 1; USCIS Publishes Interim Rule Prohibiting Multiple H-1B Petitions for Same Employee

On April 1, 2008, employers may file petitions requesting H-1B workers for fiscal year (FY) 2009 employment starting on October 1, 2008. For FY 2009, Congress has once again set a tight limit of 65,000 for most H-1B workers, and the supply is expected to be exhausted immediately. Last year, the cap was reached in one day.

USCIS published an interim final rule, effective March 24, 2008, that prohibits employers from filing multiple H-1B petitions for the same employee. USCIS said the changes "will ensure that companies filing H-1B petitions subject to

congressionally mandated numerical limits have an equal chance to employ an H-1B worker." USCIS will deny or revoke multiple petitions filed by an employer for the same H-1B worker and will not refund the filing fees submitted with multiple or duplicative petitions. USCIS noted that the interim rule does not preclude related employers (such as a parent company and its subsidiary) from filing petitions on behalf of the same worker for different positions, based on a legitimate business need.

The first 20,000 H-1B workers who have a U.S. master's degree or higher are exempt from the cap. Under current procedures, which are not changed by this rule, once USCIS receives 20,000 petitions for aliens with a U.S. master's degree or higher, all other cases requesting the educational exemption are counted toward the 65,000 cap. Once the 65,000 cap is reached for a fiscal year, USCIS announces that the cap has been filled and rejects further petitions subject to the cap.

The rule stipulates that if USCIS determines that the number of H-1B petitions received meets the cap within the first five business days of accepting applications for the coming fiscal year, USCIS will apply a random selection process among all H-1B petitions received during that time period. If the 20,000 advanced-degree limit is reached during the first five business days, USCIS will randomly select from those petitions before conducting the random selection for the 65,000 limit. Petitions subject to the 20,000 limit that are not selected in that random process will be considered along with the other H-1B petitions in the random selection for the 65,000 limit.

The interim rule further clarifies that USCIS will deny petitions that incorrectly claim an exemption from any H-1B numerical limits. Those filing fees will not be returned. Under current procedures, which are not changed by this rule, once U.S. Citizenship and Immigration Services (USCIS) receives 20,000 petitions for aliens with a U.S. master's degree or higher, all other cases requesting the educational exemption are counted toward the 65,000 cap. Once the 65,000 cap is reached for a fiscal year, USCIS will announce that the cap has been filled and reject further petitions subject to the cap.
As noted above, H-1B availability is likely to be exhausted immediately.

The interim final rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-5906.pdf. A USCIS press release announcing the interim rule is available at

http://www.uscis.gov/files/article/H-1B_multi_filing_19Mar08.pdf. A fact sheet with additional details is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=fb68c9b9d87c8110VgnVCM10000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. Questions and answers are available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=0189c9b9d87c8110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

In other H-1B news, the March 2008 edition of *Business Week* noted that two outsourcing companies based in Bangalore, India, top the list of approved H-1B visa petitions in 2007: Infosys Technologies (4,559 visas) and Wipro (2,567 visas). Six of the top 10 H-1B visa recipients are based in India, and Indian outsourcers received nearly 80 percent of the visas approved for the top 10 participants in the H-1B program. Infosys has 88,000 workers worldwide, with 9,000 of those in the U.S., including 7,500 H-1Bs.

Bill Gates testified on March 12, 2008, before the House of Representatives' Committee on Science and Technology about the "gathering threat to U.S. preeminence in science and technology innovation." He proposed a four-part plan, including revamping immigration rules for highly skilled workers so that U.S. companies can attract and retain the world's best scientific talent. As a result of an artificially low H-1B cap and "counterproductive immigration policies," he said, many U.S. firms, including Microsoft, have been forced to locate staff in countries that welcome skilled foreign workers to do work that otherwise could have been done in the U.S. Mr. Gates said that an increase in the number of H-1B visas likely would increase employment of U.S. nationals as well, citing a study of technology companies in the S&P 500 that found that for every H-1B visa requested, leading U.S. technology companies increased their overall employment by five workers.

Mr. Gates's testimony before the House committee is available at http://democrats.science.house.gov/Media/File/Commdocs/hearings/2008/Full/12mar/gates_testimony_12mar08.pdf.

A policy brief on H-1B visas and job creation by the National Foundation for American Policy (NFAP), which notes that hiring H-1B visa holders is associated with increases in employment at U.S. technology companies, is available at

http://www.nfap.com/pdf/080311h1b.pdf. An NFAP policy brief on job openings and the need for skilled labor in the U.S. economy is at http://www.nfap.com/pdf/080311talentsrc.pdf.
On April 1, 2007, United States Senators Dick Durbin (D-IL) and Chuck Grassley (R-IA) sent a letter to the top 25 recipients of approved H-1B visa petitions in 2007, seeking detailed information on how each firm uses the visa program. These firms were responsible for nearly 20,000 of the available H-1B visas last year.

The letter was sent to the following companies: Infosys Technologies Ltd., Wipro Limited, Satyam Computer Services Ltd., Cognizant Tech Solutions, Microsoft Corporation, Tata Consultancy Services Ltd., Patni Computer Systems Inc., US Technology Resources LLC, I-Flex Solutions Inc., Intel Corporation, Accenture LLP, Cisco Systems Inc., Ernst & Young LLP, Larsen & toubro Infotech Ltd., Deloitte & Touche LLP, Google Inc., Mphasis Corporation, University of Illinois at Chicago, American Unit Inc., Jsmm International Inc., Objectwin Technology Inc., Deloitte Consulting, Prince Georges County Public Schools, JPMorgan Chase and Co., and Motorola Inc. The text of the letter is available on Senator Durbin's website, http://durbin.senate.gov.

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2. DHS Issues No-Match Supplemental Proposed Rule; Public Comments Accepted Until April 25

On March 26, 2008, the Department of Homeland Security (DHS) issued a supplemental proposed rule on procedures for employers who receive a "no-match letter" from the Social Security Administration (SSA) or a "notice of suspect document" from the Department of Homeland Security (DHS) casting doubt on the employment eligibility of the employer's workers. The previous final rule, which was published on August 15, 2007, was preliminarily enjoined by the U.S. District Court for the Northern District of California on October 10, 2007. The DHS issued the new supplemental proposed rule to clarify certain aspects of the August 2007 final rule and to respond to three findings underlying the district court's injunction.

The agency seems essentially determined to press ahead with its previously stated plans despite concerns about their potential negative impact. The *New York Times* warned in a March 27, 2008, editorial that the DHS's plan will "throw thousands of law-abiding American workers and companies off a cliff in

perilous economic times," noting that the SSA's inspector general estimated that about 17.8 million of the agency's 435 million records contain errors that could lead to a no-match letter, and that 70 percent of those 17.8 million records belong to native-born Americans.

The DHS's supplemental proposed rule addresses three findings of the district court, which questioned whether the DHS had: (1) supplied a reasoned analysis to justify what the court viewed as a change in the DHS's position: that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized; (2) exceeded its authority (and encroached on the authority of the Department of Justice) by interpreting the antidiscrimination provisions of the Immigration Reform and Control Act of 1986; and (3) violated the Regulatory Flexibility Act by not conducting analysis of the rule's impact on small businesses.

The DHS noted that although the mere receipt of an SSA no-match letter may not obligate employers to repeat the full I–9 employment verification process, employers "cannot turn a blind eye to SSA no-match letters and should perform reasonable due diligence." The supplemental proposed rule emphasizes the idea of eliminating ambiguity and confusion regarding an employer's responsibilities upon receipt of a no-match letter, acknowledging that previous guidance was in the form of case-by-case responses to individual queries from employers and others, resulting in a lack of uniformity and multiple interpretations by employers.

The DHS said that SSA no-match letters are sent to employers whose wage reports reveal at least 11 workers with no-matches, and where the total number of no-matches represents more than 0.5 percent of the employer's total Forms W-2 in the report. The agency believes these criteria limit the recipients of employer no-match letters to those who have potentially significant problems with their employees' work authorization. Employers with stray mistakes orminorinaccuracies in their records, the DHS said, do not receive employer no-match letters. As a result, the DHS concluded that employers who receive no-match letters cannot reasonably assume the problems are merely trivial clerical errors, and therefore cannot reasonably simply ignore those letters. The DHS therefore finds that an employer's failure to conduct reasonable due diligence upon receipt of an SSA no-match letter can, in the totality of the circumstances, establish constructive knowledge of an

employee's unauthorized status.

The DHS noted that the August 2007 final rule specifies actions that can be taken by an employer that the agency will consider to be a reasonable response to receiving an SSA no-match letter or DHS letter, which "will eliminate the possibility that either letter can be used as any part of an allegation that an employer had *constructive knowledge* that it was employing an alien not authorized to work in the United States."

In light of the district court's concerns about the DHS's possible encroachment into the authority of DOJ, in the March 2008 supplemental proposed rule the DHS rescinds the statements in the preamble of the August 2007 final rule describing employers' obligations under antidiscrimination law and discussing the potential for antidiscrimination liability faced by employers that follow the "safe-harbor" procedures set forth in the August 2007 rule. For example, the DHS is rescinding conclusive statements from the preamble of the August 2007 final rule such as, "employers who follow the safe harbor procedures...will not be found to have engaged in unlawful discrimination." The DHS said it also will "revisit" the language in its insert letter after the supplemental proposed rule is finalized. The rescissions do not change existing law or require any change to the rule text, the DHS noted.

Employers seeking information regarding their antidiscrimination obligations in following the safe harbor procedures in the August 2007 final rule, as modified by the March 2008 supplemental rule, should review new guidance from the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices at http://www.usdoj.gov/crt/osc/index.html. Employers may also seek advice on a case-by-case basis through OSC's toll-free employer hotline at 1–800–255–8155. The DOJ's public guidance on employers' antidiscrimination obligations will be published in a *Federal Register* notice when the DHS promulgates the March 2008 supplemental proposed rule as a final rule.

The DHS is proposing to further clarify two aspects of the August 2007 final rule. First, the rule instructs employers seeking safe harbor that they must "promptly" notify an affected employee after the employer has completed its internal records checks and has been unable to resolve the mismatch. After reviewing the history of the rulemaking, the DHS believes that this obligation for prompt notice ordinarily would be satisfied if the employer contacts the employee within five business days after the employer has completed its

internal records review. The DHS emphasized that an employer does not need to wait until after completing this internal review to advise affected employees that the employer has received the no-match letter and request that the employees seek to resolve the mismatch: "Immediately notifying an employee of the mismatch upon receipt of the letter may be the most expeditious means of resolving the mismatch."

Second, plaintiffs in the litigation before the district court raised a question as to whether, under the August 2007 final rule, an employer could be found liable on a constructive knowledge theory for failing to conduct due diligence in response to the appearance of an employee hired before November 6, 1986, in an SSA no-match letter. The DHS noted that when Congress enacted INA section 274A as part of the 1986 Immigration Reform and Control Act, it included a grandfather clause in that legislation exempting workers hired before IRCA's date of enactment from the provisions of section 274A(a)(1) and (a)(2). Because those statutory bars against hiring or continuing to employ individuals without work authorization do not apply to workers within that grandfather clause, the DHS said that the August 2007 final rule, as published and as supplemented, does not apply to any such workers that may be listed in an SSA no-match letter.

The DHS said it has filed an appeal to have the preliminary injunction dissolved. The agency is continuing this simultaneous rulemaking in the meantime, which it said is intended to lead to the rule becoming effective as quickly as possible and "is not a concession of any issue pending in the litigation."

Comments are due by April 25, 2008, and should be submitted using the procedures outlined in the supplemental proposed rule, which details the DHS's position on the district court's ruling and includes information on estimated costs of compliance for employers. The supplemental proposed rule is available at http://edocket.access.gpo.gov/2008/pdf/E8-6168.pdf. A press release is available at http://www.dhs.gov/xnews/releases/pr_1206124972832.shtm.
Employers may also wish to consider using E-Verify, an Internet-based system operated by the DHS in partnership with the SSA that allows participating employers to verify the employment eligibility of their newly hired employees, including the validity of their Social Security Numbers. E-Verify is available at http://www.dhs.gov/ximgtn/programs/gc_1185221678150.shtm.

Contact your Alliance of Business Immigration Lawyers member for legal guidance and assistance in particular cases.

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3. USCIS Issues Guidance on H-1B Specialty Occupation Licensure Requirements

U.S. Citizenship and Immigration Services (USCIS) sent guidance to the field on March 21, 2008, updating the *Adjudicator's Field Manual* on accepting and adjudicating H-1B petitions for specialty occupations when a required professional license cannot be obtained because of state licensing requirements mandating possession of a valid immigration document, such as an approved H-1B petition, as evidence of employment authorization before the license can be issued. USCIS noted that this situation creates a "Catch-22" adjudicative difficulty for the agency because approval of the H-1B petition may be contingent on the beneficiary's possession of the required license. USCIS stated that in such situations, it will allow the temporary approval of the petition provided all other requirements are met. Such an approval will not constitute authorization for the beneficiary to practice his or her profession without the required license but should be considered "merely a means to facilitate the State or local licensing authority's issuance of such a license."

USCIS instructed adjudicators to approve an H-1B petition for a one-year validity period if a state or local license to engage in the profession is required and the appropriate licensing authority will not grant the license absent evidence that the beneficiary has been granted H-1B status. As a condition to approving such a petition, USCIS stated, the beneficiary must demonstrate that he or she has filed the licensing application in accordance with state or local rules and procedures. Further, adjudicators should verify that the beneficiary is fully qualified to receive the license, meaning that all educational, training, experience, and other substantive requirements must be met at the time of filing of the petition. Where appropriate, USCIS noted, the adjudicator may issue a request for evidence.

Any petition that requests an extension of stay on behalf of a beneficiary who has been granted H-1B status under this provisional measure, USCIS said, must show that the beneficiary has obtained the requisite license. If he or she has not obtained the license at the time the petition and extension are filed, the petition will be denied.

USCIS referenced earlier guidance applicable in other contexts. For example, in

2001 the agency's precursor, the Immigration and Naturalization Service, instructed adjudicators to approve H-1B petitions for a one-year period for teachers who could not obtain state licensure unless they could obtain social security numbers, which in turn could not be obtained unless the teachers were already authorized to work in the U.S. At the end of the one-year period, the teacher was required to file another petition with a request for extension, and also present evidence at such time that the license had been obtained. The memorandum is available at http://www.uscis.gov/files/pressrelease/AFM_Update_Chap31_21Mar08.pdf.

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4. Biometrics Required for Re-Entry Permits and Refugee Travel Documents

U.S. Citizenship and Immigration Services (USCIS) issued revised instructions, effective March 5, 2008, for the Application for Travel Document (Form I-131). The revised instructions require applicants for re-entry permits and refugee travel documents to provide biometrics (e.g., fingerprints, photographs) at USCIS Application Support Centers (ASCs). USCIS will notify applicants of their appointments at designated ASCs after submission of the I-131 application.

The new instructions for the I-131 require that applicants for re-entry permits and refugee travel documents who are ages 14 through 79 provide biometrics before departing from the U.S. Applicants for re-entry permits and refugee travel documents who are in the U.S. must pay an $80 biometrics fee or submit a fee waiver request with sufficient documentation. The $305 I-131 application fee cannot be waived. The I-131 instructions also provide guidance for certain persons applying for refugee travel documents (not re-entry permits) who are abroad at the time of filing, on visiting a U.S. Embassy or consulate for fingerprinting.

The announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9c7c6a41ccf78110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD. The I-131 instructions are available at http://www.uscis.gov/files/form/I-131instr.pdf and the form is at

http://www.uscis.gov/files/form/I-131.pdf.

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5. PERM Data Released

The Employment and Training Administration's Office of Foreign Labor Certification (OFLC) recently released fiscal year (FY) 2007 data covering cases processed under the Permanent Labor Certification Program. Selected statistics include:

- More than 85,100 PERM cases were certified during FY 2007.
- Foreign workers representing 176 countries were certified for permanent work in the U.S.
- Nearly 6 out of 10 PERM cases were certified for small employers (defined as fewer than 250 workers).
- Top states: California (20,222), New York (8,843), New Jersey (6,594), Texas (6,534), Florida (5,128).
- Top countries: India (24,573), China (6,846), Mexico (6,442), South Korea (5,159), Canada (4,837).
- Top employers: Microsoft Corporation; Cognizant Technologies; Oracle USA, Incorporated; Intel Corporation; Ernst & Young, LLP; Motorola Incorporated.

The PERM data is available at http://www.foreignlaborcert.doleta.gov/pdf/PERM_Data_FY07_Announcement.pdf.

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6. WHTI-Compliant Document To Be Required for Land, Sea Travel Into the U.S.

Effective June 1, 2009, travelers will be required to present a passport or other approved secure document denoting citizenship and identity for all land and sea travel into the U.S., the Departments of Homeland Security and State announced. The final rule for the land and sea portion of the Western Hemisphere Travel Initiative (WHTI), announced March 27, 2008, will apply to previously exempt travelers, including citizens of the U.S., Canada and Bermuda.

The DHS said it is releasing the WHTI land and sea final rule more than a year in advance of its implementation to give the public ample notice and time to

obtain the WHTI-compliant documents they will need to enter or re-enter the U.S. on or after June 1, 2009. The agency noted that many cross-border travelers already have WHTI-compliant documents, such as a passport or a Trusted Traveler Card (NEXUS, SENTRI, and FAST), or a Washington state enhanced driver's license (EDL). The Department of State is already accepting applications for new passport cards and additional states and Canadian provinces will be issuing EDLs in the next several months, all of which the DHS said are options specifically designed for land and sea border use.

Beginning June 1, 2009, DHS will institute special provisions that allow school or other organized groups of children ages 18 and under who are U.S. or Canadian citizens to enter the U.S. with proof of citizenship alone.

Information on specific documentation requirements is available for U.S. citizens at http://www.cbp.gov/xp/cgov/travel/vacation/ready_set_go/ and for non-U.S. citizens at http://www.cbp.gov/xp/cgov/travel/id_visa/. The full text of the final rule is available at http://www.dhs.gov/xlibrary/assets/whti_landseafinalrule.pdf. The DHS has also designated the enhanced driver's license and identity document issued by Washington state as a travel document under the WHTI. Questions and answers on the WHTI final rule are available at http://www.dhs.gov/xnews/releases/pr_1206635771151.shtm.

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7. Around the States: Rhode Island, Virginia Crackdowns; NYC Losing to Competition

State and local authorities in several locations continued efforts to crack down on undocumented immigration. In Rhode Island, Governor Don Carcieri, under pressure because of a massive budget deficit, signed an executive order directing state police to enter into an agreement with federal immigration authorities to permit access by the police to immigration databases. Such access would give them the ability to check the immigration status of criminals, victims, witnesses, and those supplying the police with confidential tips, according to state police Major Steven O'Donnell. The prison system is expected to negotiate a similar agreement. The executive order also requires businesses and state agencies to verify the status of employees.

As of March 3, 2008, Prince William County in Virginia r