



FOR THE BENEFICIARIES: LICENSES, TAXES & THE ANCILLARY CONSIDERATIONS TO HOLDING IMMIGRATION STATUS IN THE U.S.

Posted on July 29, 2008 by Cyrus Mehta

by
Adam Ketcher*

Every year, scores of immigration attorneys flock to the annual conference of the American Immigration Lawyers Association (AILA) to discuss new developments and to learn best practices in family- and employment-based immigration and refugee law. The conference hosts panels by leaders in the field, and, equally important, open forums with government agencies. We all attend the conference with our own agenda – with our own problem case(s) in mind – and the hope of finding some guidance where none is provided by the statute, regulations or policy memoranda. This year, the conference was held in Vancouver, Canada from June 25 to June 28.

GAPS IN "CAP GAP"

For example, I and many others have clients in F-1 student status that are lawfully working in the United States pursuant to the optional practical training ("OPT") available post-completion of their degrees, and who are the beneficiaries of new employment H-1B petitions that were selected during the H-1B lottery for FY2009.¹ In past years, such beneficiaries often faced what was called the "cap gap," which meant that their OPT work authorization expired prior to their H-1B begin dates of October 1.² Through an interim final rule promulgated on April 8, 2008, however, U.S. Citizenship and Immigration Services ("USCIS") has provided OPT extensions for the above beneficiaries, among others.³ These particular OPT extensions are automatic, and continue

through the October 1, 2008 begin date of H-1B status, unless the underlying petition is subsequently denied, rejected or revoked. Yet, true to the Law of Unintended Consequences, USCIS has ensured that by allowing for the unbroken employment of these beneficiaries, such employment remains unbroken. By virtue of the automatic OPT extension, these students are now incapable of traveling outside of the United States, as opposed to being compelled to, and then returning to work on their expired, OPT Employment Authorization Documents ("EADs") during the remainder of their extension periods.

Under 8 C.F.R. § 214.2(f)(13), OPT students may only travel provided they possess valid EADs. Although the Student and Exchange Visitor Information System ("SEVIS") has been updated to allow Designated School Officials ("DSOs") to print new Forms I-20 that are valid throughout the automatic OPT extension period, USCIS will not issue these beneficiaries new EADs.⁴ Perhaps, this is because of the impracticality of processing the applications and issuing the newly enhanced, secure EAD documents that would bear a validity date that only reached to September 30, 2008. Nevertheless, during one of the first open forums, AILA panelists sought guidance on this issue from representatives of USCIS, as well as U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement ("ICE"). The response was that attorneys should advise these OPT H-1B beneficiaries not to travel during the automatic extension period if they wish to continue to work, even where they obtain renewed I-20s prior to their departure. Where an OPT beneficiary does choose to leave the U.S., s/he must first obtain an H-1B visa to return to the United States and assume H-1B employment, as his or her F-1 visa will no longer be valid for re-entry. It is important to note however that the regulations only permit the holder of an H-1B visa to enter the U.S. 10 days prior to the begin date of his or her H-1B status; even still, s/he may not actually recommence his or her employment until October 1, 2008. *See* 8 C.F.R. § 214.2(h)(13).

USCIS PEAKS INTO FACEBOOK

The open forum comment that seemed to create the most chatter during the conference was when USCIS and the U.S. Department of Labor (DOL) both noted that they look to sources of information that are independent of the record established by a petition and its supporting documentation to verify the

information contained therein. What this means is that the agencies now look to public information that is available on the web that concerns, for example, the finances or business operations of a sponsoring employer to determine whether that employer is, in fact, offering bona fide employment to a nonimmigrant worker.

Or, keeping this article about the beneficiaries, USCIS explained that it often searches through Myspace and Facebook, prior to marriage-based adjustment interviews, to see what the couple may be discussing with each other and their contacts and whether they entered into a bona fide marriage. In response to the murmur of objection that began to build throughout the room despite a relatively recent New York Times article that noted employers have been doing the same for quite some time, USCIS analogized its position to that of a bank that inquires into the financial viability of a prospective borrower. I am not so horrified by the idea of government agencies accessing information that people have themselves made available to the general public, depending, of course, on whether USCIS is accessing private profiles through agreements with these online social network providers. However, this analogy does highlight the USCIS mission as one that is primarily oriented around enforcement rather than the impartial adjudication of an established record, and justifies concerns that petitions could be denied for undisclosed reasons.

DRIVER'S LICENSES, TAXES AND OTHER CONSIDERATIONS

Other than offering a warning to those who post online what is better left stated in discreet conversation, I was hoping to write this article to provide beneficiaries with some guidance on day-to-day issues that they frequently raise, but which I am generally unable to answer because it falls outside the scope of our representation and my area of expertise. Specifically, I am referring to beneficiaries' tax liability, their eligibility to obtain driver's licenses and their ability to open bank accounts in the U.S. It was with these types of questions in mind that I sat in on an AILA conference panel that discussed the localization of immigration law through a recent proliferation of state and local regulations relating to immigration status.

According to a National Conference of State Legislators ("NCLS") report released on July 24, 2008, entitled State Laws Related to Immigrants and Immigration, 175 laws and resolutions relating to immigration on a local level have so far been enacted in 2008 by 39 state legislatures.⁵ The range of issues

dealt with in these bills includes education, employment, health benefits, and the issuance of driver's licenses, among others. Whether states have decided to acquiesce to or to refuse compliance with the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005), 49 states, as well as the District of Columbia, now require that an applicant for a driver's license provide a valid Social Security Number.⁶ Through the REAL ID Act, Congress has required that states verify a person's social security number ("SSN") or verify that the person is not eligible for an SSN prior to issuing a driver's license or identity document. Moreover, the Act states that state identification documents may only take one of three possible forms: (1) a tamperproof driver's license that is valid for no more than 8 years and issued only upon the receipt of proof that the applicant possesses or is pursuing some form of permanent immigration status, (2) a temporary driver's license with a validity dates that mirror the dates through which the applicant has proven his or her immigration status is valid, or (3) an identification document that is clearly distinguishable, by color or some other unique identifier, from those that meet the requirements of the REAL ID Act.⁷ This third form of identification has the potential to create a separate subclass of undocumented, though possibly lawfully present, non-citizens. Congress has partially conditioned federal highway funding upon proof that states are acting to achieve full compliance with REAL ID by December 31, 2009.

As the states have taken different positions with respect to REAL ID, many refusing to comply with the Act's requirements because of the enormity of the projected costs involved, there is no clear answer to offer beneficiaries with respect to how exactly they should go about applying for a driver's license in the U.S. That said, the first and best suggestion is always to contact your employer and/or attorney to ensure that timely submissions are made to extend your nonimmigrant status.⁸ To ascertain what documentation one is required to assemble to apply for a driver's license, s/he must visit the web sites of his or her local Department of Motor Vehicles, which can easily be found through a simple boolean search naming the agency and the state on any search engine.⁹

The New York Department of Motor Vehicles ("DMV"), for example, requires that an applicant show his or her Social Security Card with any application for an initial driver's license. Where the applicant is not eligible for a Social Security Card, s/he must provide a letter or Form SSA-L676 from the U.S. Social Security

Administration ("SSA") that is issued no more than 30 days prior to the date of application and indicating such ineligibility, as well as the USCIS documentation that the SSA relied upon to determine the applicant's ineligibility.¹⁰ Beyond the SSN requirement, the DMV requires proof of identification that totals 6 points on its list for establishing same, entitled Documents Accepted as Proofs of Identity and Date of Birth.¹¹ The foreign passport of a temporary nonimmigrant must contain a visa and Form I-94;¹² even then, it is only awarded 3 points, as opposed to the 4 points given a U.S. passport. The beneficiary applying for a NYS driver's license must then make up the remaining 3 points by providing additional evidence. All other acceptable forms of identification on the list, including birth or marriage certificates (valued 2 points each), must be issued from within the United States. Thus, a noncitizen must collect a hodgepodge of secondary documentation to make up the difference of 3 points. Possible documents, which are valued at 1 point each, include a computer-printed pay stub or employee ID card, health insurance card or a medical prescription card, W-2 Form that shows a Social Security Number, a bank statement, cancelled check (displaying a pre-printed name), ATM card or a debit card (displaying a pre-printed name and signature) or a valid major US credit card.

To apply for an SSN, an individual must submit Form SS-5.¹³ SSA has published an online Fact Sheet (published October 2006) that provides a very brief list of documents that may be used to demonstrate current immigration status.¹⁴ In situations where problematic issues arise and applications are delayed, an applicant may contact the SSA at 1-800-772-1213, or visit a local SSA office.¹⁵

Where an individual is ineligible to receive a social security number s/he must apply for an IRS Individual Taxpayer Identification Number ("ITIN"), through submission of Form W-7 to meet his or her tax obligations.¹⁶ Generally, Form W-7 may only be submitted with the federal tax return for which the ITIN is needed, yet specific exceptions are noted in the instructions through which the form may be submitted independently; such as to allow third-party withholding of passive income in the form of interest on a bank account. However, to open a bank account in the U.S., or to add a spouse to an existing account, banks require that the individual produce an SSN or ITIN.

Finally, beneficiaries' can generally assess their tax obligations – with certain

exceptions that go far beyond the scope of this article – under the "Substantial Presence Test," which subjects an individual to tax liability where s/he is present in the United States for at least 31 days during the immediate calendar year, as well as 183 or more days of the current and prior two years under the following formula: All qualifying days in the current year + one-third of the qualifying days in the immediately preceding year + one-sixth of the qualifying days in the second preceding year = 183.¹⁷ Thus, I advise all beneficiaries with tax questions to speak directly with a qualified tax consultant. If, prior to speaking with a tax consultant, a beneficiary would like to research the tax code further, Internal Revenue Service ("IRS") Publication 519 (2007) provides guidance to nonresident aliens (generally, taxed only on income connected to U.S. sources) and resident aliens (generally, tax on worldwide income) on how to determine their tax status what they must do to file U.S. tax returns.¹⁸ Otherwise, the IRS provides Taxpayer Assistance Centers ("TAC"), which one can find through an online locator similar to the one provided by the SSA.¹⁹

Hopefully, the above discussion and references provide useful answers to those beneficiaries, and others, who have questions similar to those initially outlined in this article. If nothing else, in a country where the current social climate requires that the Attorney General of the State of Tennessee step in and clarify that state law does not require applicants for marriage licenses to produce a social security number or visa, as he did last Monday, July 22, 2008, it is increasingly useful for all beneficiaries to remain cognizant of passed and pending laws in their respective states and municipalities.

*** Adam Ketcher is an Associate at Cyrus D. Mehta & Associates, PLLC where he practices immigration and nationality law. He received his J.D. in 2006 from Brooklyn Law School where he was a recipient of the Edward V. Sparer Public Interest Law Fellowship. Adam worked previously as a legal intern for Catholic Charities' Immigrant and Refugee Department, U.S. Citizenship & Immigration Services, and as a summer law clerk for the Executive Office of Immigration Review, New York City Immigration Court. He also assisted with research for an upcoming casebook on international refugee law. Adam is admitted to the bar of the State of New York.**

¹ 8 C.F.R. § 214.2(f)(10) allows F-1 students to obtain 12 months of post-

graduate employment in the U.S. where such employment is related to the area in which they received their degrees.

² This required that their petitions be submitted for consular processing, rather than as a request to change their status directly from F-1 to H-1B, and that the beneficiaries leave the U.S. to obtain H-1B visas prior to commencing their H-1B employment, even though the sponsoring employer was typically the same as the OPT employer.

³ 73 FR 18944. See also U.S. Immigration and Customs Enforcement, *Updates to Post-Completion Optional Practical Training (April 23, 2008)* at http://www.ice.gov/sevis/updates_postcompletion_opt.htm#_Toc174419532.

⁴ OPT students are responsible for contacting their DSOs and verifying their eligibility for the automatic extensions on the SEVIS by providing copies of the Form I-797 notices bearing the receipt numbers of their H-1B petitions. Please also note that pursuant to 8 C.F.R. § 214.2(f)(12) and (17) all students must already report to their DSOs any changes of address, legal name and/or interruptions of employment within 10 days throughout the entirety of their post-completion OPT.

⁵ Available at <http://www.ncsl.org/programs/press/2008/pr0708immigrationlegislation.htm>. See also the web site of the National Immigration Law Center (NILC) at <http://www.nilc.org/immlawpolicy/index.htm>, and the restrictionist group, the Immigration Reform Law Institute, at <http://www.irli.org/bulletin0708.html>.

⁶ Joan Friedland, *"Driving" Us Crazy – The Localization of Immigration Law: State and Local Regulations*, Immigration & Nationality Law Handbook, 2008-09 ed., AILA publications (p. 685).

⁷ Congress has also required that states limit the list of foreign documents acceptable as proof of a person's identity and date of birth to an official passport. For a reader-friendly chart of the requirements imposed on state licensing authorities by the Act, go to http://www.nilc.org/immspb/DLs/real_id_dl_tbl_051905.pdf. For a history of the REAL ID Act of 2005 and state responses, go to <http://www.ncsl.org/realid/>.

⁸ For example, under the regulations governing the Labor Condition

Application, which must be filed with DOL for an H-1B employer to petition for an extension of H-1B status on behalf of a beneficiary, such application may be made up to six months prior to the extension begin date. 20 C.F.R. § 655.730(b). For the beneficiaries of immigrant visa petitions, who are applying to adjustment their status to lawful permanent resident and who use their EADs as proof of identity, USCIS accepts renewal applications no more than 120 days prior to the expiration of their current EAD. USCIS is now issuing 2-year EADs to the beneficiaries of approved I-140s who cannot adjust their status because their priority date is not current on the date that a decision is made on their EAD application. See

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=62ae15d3ffd7a110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnV CM10000045f3d6a1RCRD>.

⁹ For an overview of State requirement for the issuance of a driver's license, current as of May 18, 2008, visit the NILC web site at http://www.nilc.org/immspbs/DLs/state_dl_rqrmts_ovrvw_2008-05-18.pdf.

¹⁰ Available at <http://www.nydmv.state.ny.us/idlicense.htm#note1>. In compliance with REAL ID, the New York DMV is issuing written requests that driver's license applicants verify their SSNs. Instructions for doing so are posted at <http://www.nydmv.state.ny.us/ssnverify/default.html>.

¹¹ For guidance on the requirements for acceptable documentation for meeting the 6 points requirement for a NYS driver's license, go to <http://www.nydmv.state.ny.us/idlicense.htm#idpoints>.

¹² A J-1 visa holder must also produce their Form IAP-66 in tandem with the passport, visa and I-94; an F-1 visa holder must produce his or her Form I-20.

¹³ Available at <http://www.ssa.gov/online/ss-5.pdf>.

¹⁴ Available at <http://www.ssa.gov/pubs/10120.html#proof>.

¹⁵ The SSA offers online a local office locator at <https://secure.ssa.gov/apps6z/FOLO/fo001.jsp>, which provides locations across

the U.S.

¹⁶ Available, with instructions, at <http://www.irs.gov/pub/irs-pdf/fw7.pdf>.

¹⁷ See I.R.C. §§ 7701(b)(1)(A) and (b)(3).

¹⁸ Available at <http://www.irs.gov/publications/p519/ar01.html>. For nonresident aliens living abroad, IRS has also published FAQ 13, available at <http://www.irs.gov/faqs/faq13.html>, which discusses their tax liabilities.

¹⁹ Available at <http://www.irs.gov/localcontacts/index.html>, or by telephone at 1-800-829-1040 between 7:00am and 10:00pm local time.