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US IMMIGRATION & NATIONALITY LAW

VISA MADNESS DURING THE MIDDLE OF SUMMER 2009

Posted on July 19, 2009 by Cyrus Mehta

by

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Since priority dates, caps, and the potential for more visa availability predominate conversations among those in the immigration attorney and immigrant communities, here is the latest round up.

How we wish we did not have to scramble for more visas by dealing with priority dates and caps, and all this was just a midsummer nightXs dream. In ShakespeareXs Midsummer NightXs Dream, Bottom, when he wakes up after his assXs head is removed, states, TI have had a dream, past the wit of man to say what dream it was.У Let us hope that if and when Comprehensive Immigration Reform is enacted, we too can heave a sigh of relief like Bottom as if what we went through was an incomprehensible dream.

China, India EB-2 Priority Dates Progress in August; DOS Determines FY 2009 Limits

The State Department's Visa Bulletin for August 2009 shows an October 1, 2003, cut-off date for both the China-mainland born and India EB-2 categories, which is close to a four-year jump from last month's cut-off date. The third preference and "other workers" employment-based categories are Unavailable; all other categories are Current. EB-3 visa numbers worldwide and for India, China, and Mexico are expected to remain unavailable for the remainder of this fiscal year at least. The EB-3 category for India could remain unavailable indefinitely.

This follows on the heels of news last month that the India and China EB-2 categories could become unavailable in August or September and remain

unavailable indefinitely. The Department had explained that there is a backlog of at least 25,000 India EB-2 cases awaiting visa numbers. Charles Oppenheim of the Department of State's Visa Office reportedly stated that without legislative relief, the waiting time for Indian EB-2 applicants may be measured in years, even decades.

The Department also noted in the August Visa Bulletin that heavy applicant demand for numbers in the employment-based fourth preference is likely to require the establishment of a cut-off date, or the preference becoming "Unavailable," for September. The category can be expected to return to a "Current" status for October, the first month of the new fiscal year.

Meanwhile, the Department of State has determined the family and employment preference numerical limits for FY 2009. The worldwide employment-based preference limit is 140,000.

The per-country limit is fixed at 7 percent of the family and employment annual limits. For FY 2009, the per-country limit is 25,620. The dependent area annual limit is 2 percent, or 7,320.

The August Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html.

H-1B Visa Cap

While most thought that the H-1B cap would get exhausted within a few days after April 1, 2009, H-1B visas are still surprisingly available. Interestingly, the H-1B cap count hovers around 45,000. As of July 10, 2009, approximately 44,900 H-1B cap subject petitions have been received by the USCIS. Earlier, on July 3, 2009, approximately 45,800 H-1B cap subject petitions were received by the USCIS, and even earlier to that on June 26, 2009, approximately 44,800 cap subject petitions were received by the USCIS.

Obviously, the economic downturn is the big reason for the fact that the H-1B cap has been plus or minus 45,000 for such a long time. But another important contributing factor may be because USCIS have become deviously strict in adjudicating H-1B petitions. If you are an IT consulting company filing an H-1B petition, the chances of being approved for an H-1B are slim if you cannot clearly establish that the H-1B beneficiary will be working at a specific client company at the time of filing and that the employment will be completely controlled by the H-1B employer.

Recently, a *FAQ* issued by the Federal Reserve developed Tin consultation with the U.S. Citizenship and Immigration Servicesу indicates that an employer who has received funding under Section 13 of the Federal Reserve Act is no longer subject to the provisions of the Employ American Workers Act (EAWA) if it has repaid its obligation. Under EAWA, any company which has received either funding under Section 13 of the Federal Reserve Act or under the Troubled Asset Relief Program (TARP) is considered to be an TH-1B dependent employerу and is required to make additional onerous attestations to the US Department of Labor when it file a Labor Condition Application. These additional attestations, including attesting that the company attempted to recruit US workers, have served as a big disincentive for banks and financial institutions from filing H-1B petitions.

An employer, however, who has repaid funds that were received under Section 13 of the Federal Reserve Act will no longer be subject to the H-1B dependent provisions of the EAWA, according to this FAQ. It is likely that employers who repaid funding through TARP may also no longer be subject to the EAWA provisions. AILA is still awaiting further guidance from the USCIS on this issue. The ability to file H-1B petitions, without being subjected to the onerous attestations, may incentivize a small group of employers to file H-1B petitions under the current FY10 H-1B quota, but any additional filings in this economy may increase the H-1B cap count by at most a few thousand more, at least in the near term.

DOS Releases DV-2010 Lottery Results

The Kentucky Consular Center has registered and notified the winners of the DV-2010 diversity visa lottery. Applicants registered for the DV-2010 program were selected at random from over 13.6 million qualified entries received during the 60-day application period that ran from October 2, 2008, until December 1, 2008. The visas have been apportioned among six geographic regions with a maximum of seven percent available to persons born in any single country. During the visa interview, principal applicants must provide proof of a high school education or its equivalent, or show two years of work experience in an occupation that requires at least two years of training or experience within the past five years.

Only participants in the DV-2010 program who were selected for further processing have been notified; those who have not received notification were

not selected. The dates for the registration period for the DV-2011 lottery program will be announced in August 2009.

The highest number for any single country went to Nigeria, at 6,006. The country-by-country breakdown of DV-2010 registrations appears at http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html.

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