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US IMMIGRATION & NATIONALITY LAW

SEPTEMBER 2010 IMMIGRATION UPDATE

Posted on September 3, 2010 by Cyrus Mehta

Headlines:

- **1.** **USCIS Implements H-1B, L-1 Fee Increases** - Effective immediately, the provisions require an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions postmarked on or after August 14, 2010.
- **2.** **Dep't of State Finalizes Rule on Electronic Application Alternative for Immigrant Visas** **-** The agency has introduced an electronic application process for immigrant visa applicants to eventually replace the current paper-based application process.
- **3.** **Dep't of Labor Releases Round 11 of Permanent Labor Certification FAQ** **-** Topics include the lack of an expedited filing option, documenting the use of an employee referral program, the effects of unsolicited documentation, and the definition of a "business day."
- **4.** **USCIS Changes Filing Location for Several Forms** **-** USCIS has changed the filing location and updated filing procedures for entrepreneurs, immigrant workers, and extensions or changes of status.
- **5.** **CBP Clarifies TN Extensions of Stay While Immigrant Petition Is Pending/Approved** - U.S. Customs and Border Protection has clarified that certain Trade NAFTA (TN) applicants may be admitted and extend their stay while an immigrant petition is pending or approved.
- **6.** **Smartsoft Agrees To Pay Nearly $1 Million in Back Wages, Interest** - Smartsoft agreed to pay 135 nonimmigrant workers after the Wage and Hour Division determined that the company violated the H-1B program's rules.
- **7.** **State Dept. Introduces ESTA Fee for Visa Waiver Travelers** - The total fee will be $14, with $4 to recover the cost of administering the Electronic

System for Travel Authorization and $10 as mandated in the Travel Promotion Act of 2009.

- **8.** **DHS Expands List of Dependents of Foreign Officials Eligible for Work Authorization** - The final rule expands the list of dependents eligible for employment authorization to include any individual who falls within a category designated by the Department of State as qualifying.
- **9.** **ABIL Global (www.abil.com): UK Government Introduces Limits on Skilled Immigration** - The new Coalition Government's main immigration policy will mark the first-ever numerical limits on employment-related migration, which historically has been market-driven.

Details...

1. USCIS Implements H-1B, L-1 Fee Increases

On August 13, 2010, President Barack Obama signed into law provisions to increase certain H-1B and L-1 petition fees. Effective immediately, the provisions require an additional fee of $2,000 for certain H-1B petitions and $2,250 for certain L-1A and L-1B petitions postmarked on or after August 14, 2010. The increases will remain in effect through September 30, 2014.

The additional fees apply to petitioners who employ 50 or more employees in the U.S. with more than 50 percent of their employees in the U.S. in H-1B or L (including L-1A, L-1B and L-2) nonimmigrant status. Petitioners meeting these criteria must submit the fee with an H-1B or L-1 petition filed:

- initially to grant a worker nonimmigrant status described in subparagraph (H)(i)(b) or (L) of section 101(a)(15), or
- To obtain authorization for a worker having such status to change employers.

USCIS is revising the Petition for a Nonimmigrant Worker (Form I-129) and instructions to comply with the new law (Public Law 111-230). To facilitate implementation, USCIS recommends that all H-1B, L-1A, and L-1B petitioners, as part of the filing packet, include the new fee or a statement of other evidence outlining why the new fee does not apply. USCIS requests that petitioners state whether the fee is required in bold capital letters at the top of the cover letter. If USCIS does not receive such explanation and/or

documentation with the initial filing, it may issue a Request for Evidence (RFE) to determine whether the petition is covered by the law. An RFE may be required even if such evidence is submitted, if questions remain.

The additional fee, if applicable, is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fee, needed to file a petition for a Nonimmigrant Worker (Form I-129), as well as any premium processing fees, if applicable.

USCIS's announcement is available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=27eac9514bb8a210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

For further commentary and articles from the CDMA Law Firm, see
USCIS ISSUES GUIDANCE ON INCREASE IN H-1B AND L FEES,
http://cyrusmehta.blogspot.com/2010/08/uscis-issues-guidance-on-increase-in-h.html
THE WORLD ACCORDING TO SENATOR SCHUMER: IF IT'S NOT A CHOP SHOP, IT'S A BODY SHOP,
http://cyrusmehta.blogspot.com/2010/08/world-according-to-senator-schumer-if.html
SILENCE IN A TIME OF TORMENT: THROWING INDIAN IT FIRMS UNDER THE BUS,
http://cyrusmehta.blogspot.com/2010/08/silence-in-time-of-torment-throwing.html

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2. Dep't of State Finalizes Rule on Electronic Application Alternative for Immigrant Visas

The Department of State has issued a final rule, effective August 3, 2010, on electronic applications. The agency has developed and introduced an electronic

application process for immigrant visa applicants to eventually replace the current paper-based application process, which consists of Parts 1 and 2 of Form DS-230, Application for Immigrant Visa and Alien Registration. The Department will continue to accept the DS-230 when necessary, but plans to eliminate the DS-230 eventually and replace it with the DS-260, Electronic Application for Immigrant Visa and Alien Registration, which is designed to be completed and signed electronically.

The final rule's supplementary information explains that the procedure is the same for the immigrant visa applicant, except that he or she will not be required to print a form to take to the visa interview. All information entered into the DS-260 will be available to the National Visa Center and to the consular officer at the time of application processing and interviewing. The applicant must sign the DS-260 electronically at the time of submission by clicking a "Sign and Submit Application" box in the application. The applicant will also be required at the interview to swear under oath that the information provided on the DS-260 is true, and to provide a biometric signature. Photos, passports, and fingerscans collected as part of the application process will identify the applicant.

A third party may assist the applicant in preparing the DS-260, but the applicant must electronically sign the application. The applicant must identify in the application any third party who has assisted in the preparation of the DS-260.

The final rule is available at http://edocket.access.gpo.gov/2010/pdf/2010-19046.pdf.

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3. Dep't of Labor Releases Round 11 of Permanent Labor Certification FAQ

The Department of Labor's Office of Foreign Labor Certification released frequently asked questions on permanent labor certification, round 11, on August 3, 2010. Topics include the lack of an expedited filing option, documenting the use of an employee referral program as a step in recruitment for a professional occupation, the effects of submitting unsolicited documentation, and the definition of a "business day."

The FAQ is available at http://www.foreignlaborcert.doleta.gov/pdf/PERM_Faqs_Round_II_0803201O.pdf.

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4. USCIS Changes Filing Location for Several Forms

U.S. Citizenship and Immigration Services (USCIS) has changed the filing location and updated filing procedures for several forms, including among others the Immigrant Petition for Alien Entrepreneur (Form 1-526), the Immigrant Petition for Alien Worker (Form 1-140), and the Application to Extend/Change Nonimmigrant Status (Form 1-539). Details are available for the 1-526 at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla/?vgnextoid=0eba904c2593a210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6alRCRD; for the 1-140 at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla/?vgnextoid=eld8904c2593a210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6alRCRD; and for the 1-539 at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6dla/?vgnextoid=9d49904c2593a210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6alRCRD.

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5. CBP Clarifies TN Extensions of Stay While Immigrant Petition Is Pending/Approved

A 2008 letter just recently released from U.S. Customs and Border Protection has clarified that Trade NAFTA (TN) applicants may be admitted and extend their stay while an immigrant petition is pending or approved, provided that they have not filed for adjustment or an immigrant visa - i.e., had an immigrant visa interview - and do not intend to immigrate on this specific visit. Once a TN files an application for an immigrant visa or adjustment of status, the letter notes, the TN would no longer be eligible for admission or an extension of stay as a TN nonimmigrant.

This is consistent with a practice that has not always been followed. A 1996 letter sent by a legacy Immigration and Naturalization Service official stated that the fact that an TN applicant is the beneficiary of an approved I-140 petition is not by itself a reason to deny an application for adjustment, extension, or readmission, if the individual's intent is to remain in the U.S. temporarily. Some CBP officers, however have not always followed that advice.

The recently released CBP letter was sent on April 21, 2008, from Paul M. Morris, Executive Director, CBP Admissibility and Passenger Programs, to Charles D. Herrington, Senior Assistant General Counsel, Micron Technology, Inc. The letter states that "the mere filing or approval of an immigrant petition does not automatically constitute intent on the part of the beneficiary to abandon his or her foreign residence. This would hold for a TN principal who may be riding on a spouse's immigrant petition."

The 2008 CBP letter is available at http://www.abil.com/articles/ABIL%20Report%20-%20TN.pdf.

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6. Smartsoft Agrees To Pay Nearly $1 Million in Back Wages, Interest

Smartsoft International Inc., a computer consulting company based in Suwanee, Georgia, has agreed to pay nearly $1 million in back wages and interest to 135 nonimmigrant workers temporarily employed by the company under the H-1B visa program, the Department of Labor (DOL) announced on August 17, 2010. The agency's Office of the Solicitor reached the agreement following a determination by the Wage and Hour Division that the company

violated the H-1B program's rules. Smartsoft also has U.S. offices in Sunnyvale, California, and North Brunswick, New Jersey.

A Wage and Hour Division investigator determined that some employees were not paid any wages at the beginning of their employment, were paid on a part-time basis despite being hired under a full-time employment agreement, and were paid less than the prevailing wage applicable to the geographic locations where they performed their work.

The company contested the Wage and Hour Division's conclusions and requested a formal hearing with the DOL's Office of Administrative Law Judges. As part of the agreement, the company will drop any further challenges.

The DOL's announcement is available at http://www.dol.gov/opa/media/press/whd/whd20101111.htm.

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7. State Dept. Introduces ESTA Fee for Visa Waiver Travelers

The Department of State released a cable to the field in August 2010 that provides information on implementation of the Travel Promotion Act of 2009 (TPA), signed into law on March 4, 2010, and fee collection for the Electronic System for Travel Authorization (ESTA). Under the TPA, fees collected from international travelers from Visa Waiver Program (VWP) countries, matched by private sector contributions, will fund the Corporation for Travel Promotion. The fees will be collected through the ESTA system, which the Department of Homeland Security (DHS) administers.

On August 6, 2010, the DHS announced an interim final rule that requires travelers from VWP countries to pay operational and travel promotion fees when applying for ESTA beginning September 8, 2010. The total fee will be $14, with $4 to recover the cost of administering the ESTA system and $10 as mandated in the TPA.

The announcement, which provides additional details, is available at http://travel.state.gov/pdf/Introduction%20of%20the%20ESTA%20fee%20for%2

0Visa%
20Waiver%20Travelers%20-%20August2010.pdf.

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8. DHS Expands List of Dependents of Foreign Officials Eligible for Work Authorization

The Department of Homeland Security (DHS) published a final rule on August 10, 2010, amending its regulations governing the employment authorization for dependents of foreign officials classified as A-1, A-2, G-1, G-3, and G-4 nonimmigrants. The rule, effective August 9, 2010, expands the list of dependents eligible for employment authorization to include any individual who falls within a category designated by the Department of State (DOS) as qualifying.

U.S. Citizenship and Immigration Services (USCIS) will only issue employment authorization documents to those dependents of foreign officials who are recognized by DOS as qualifying. Qualifying dependents must fall within a bilateral work agreement or de facto arrangement, listed on DOS's Web site at http://www.state.gov/m/dghr/flo/c24338.htm.

To apply for employment authorization documents, eligible dependents first must obtain an endorsement from DOS on an Interagency Record of Request, Form I-566. The individual must then file the I-566 along with an Application for Employment Authorization, Form I-765, with USCIS.

The announcement is available at
http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?v
gnextoid=e9867236f9c5a210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c
7755cb9010VgnVCM10000045f3d6a1RCRD.

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9. ABIL Global (www.abil.com): UK Government Introduces Limits on Skilled Immigration

The United Kingdom (UK) announced on June 28, 2010, that it will introduce limits on the numbers of non-European Union (EU) migrants coming to the UK under both the highly skilled and the sponsored routes of the Points Based System (PBS). The new Coalition Government's main immigration policy will mark the first-ever numerical limits on employment-related migration, which historically has been market-driven. The limits are a response to the levels of net migration to the UK, which have increased significantly since 2004 with the enlargement of the EU.

On July 19, 2010, the Government also introduced an interim limit, in effect until April 2011, aimed at reducing the number of certificates of sponsorship that each employer may assign to migrant workers under Tier 2 (General) and reducing the number of visas issued under the Tier 1 highly skilled category. Many employers, who had been allocated these certificates when they registered as licensed sponsors under the scheme, have had their allocation reduced significantly (in some cases to zero) and must now make requests for additional allocations of certificates, which the UK Border Agency states will be approved only "in exceptional circumstances."

The interim cap is already the subject of a legal challenge. With those extending their status in the UK given priority within the limits, employers who have paid to be licensed sponsors and have taken on significant compliance duties are now left with uncertainty about whether they can sponsor new hires from outside the EU.

Permanent limits will be introduced in April 2011. The UK government is undertaking a consultation process on how the limits should be imposed and, in particular, whether this should be on a first-come, first-served basis and whether intracompany transferees and family members should be included in the overall limit. For the points-based highly skilled route, a system of pooling, under which the highest-scoring applicants are picked from the pool each month, is also being considered.

There are significant concerns among major UK business groups and

companies that the limits will damage the UK's reputation as a place to do business and its competitiveness in the global economy.

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