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US IMMIGRATION & NATIONALITY LAW

OCTOBER 2010 IMMIGRATION UPDATE

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Headlines:

- **1.** **USCIS Raises Many Fees, Adds New Fees** – Among other things, USCIS is raising fees for most immigration benefits by a weighted average of 10 percent, establishing several new fees, and raising the premium processing service fee.
- **2.** **2012 Diversity Visa Lottery Program Registration Begins in October** – The Department of State strongly encourages applicants not to wait until the last week of the registration period to enter, because heavy demand may result in online delays and missing the deadline.
- **3.** **DOS Solicits Comments on Nonimmigrant Treaty Trader/Investor Application** – The Department of State has submitted the Nonimmigrant Treaty Trader/Investor Application to the OMB for approval to extend its validity, and seeks public comments for up to 30 days from September 23, 2010.
- **4.** **FY 2011 Visa Numbers Available on October 1, 2010; DOS Updates China Reciprocity Schedule** – Visa numbers once again are available for many categories as of October 1; the Department amended its visa reciprocity schedule for China to allow for 12-month multiple-entry visas for H visa applicants.
- **5.** **DOS Issues Travel Warning for Mexico** – The Department has issued a travel warning for Mexico in response to the deteriorating security situation there; as of September 10, 2010, the Consulate General in Monterrey is a partially unaccompanied post.
- **6.** **Dep't of State Updates Guidance on Medical Grounds of Inadmissibility** – Following an update by the CDC to its technical instructions, the State Department has updated guidance on medical grounds of inadmissibility and issued a corresponding cable to the field.

- **7.** **USCIS Discusses Effects of Invalid Puerto Rico Birth Certificates on I-9 Process** – After September 30, 2010, all certified copies of Puerto Rico birth certificates issued before July 1, 2010, will become invalid, but employers should not re-verify the employment eligibility of existing employees who presented a certified copy of a Puerto Rico birth certificate for I-9 purposes and whose employment eligibility was verified on the I-9 before October 1, 2010.
- **8.** **ICE Approves Special Relief for Certain F-1 Haitian Students** – The suspension of certain regulatory requirements allows eligible Haitian F-1 students to obtain employment authorization, work an increased number of hours during the school term and, if necessary, reduce their course load while continuing to maintain their F-1 student status.
- **9.** **U.S. Mission in Canada Announces New Appointment Service for Visa Applicants Coming to U.S.** – Applicants now must pay their machine-readable visa fee before scheduling an appointment.
- **10. ABIL Global (www.abil.com): Repercussions of the Global Economic Crisis on Mexican Immigration Policies** – Immigration authorities have become stricter in their adherence to a law that regulates the proportion of Mexican and foreign employees in a company legally established in Mexico.

Details…

1. USCIS Raises Many Fees, Adds New Fees

In a final rule effective November 23, 2010, U.S. Citizenship and Immigration Services (USCIS) is making changes to its fee structure. Applications or petitions mailed, postmarked, or otherwise filed on or after November 23, 2010, must include the new fees.

Among other things, USCIS is raising fees for most immigration benefits by a weighted average of 10 percent, establishing several new fees, and raising the premium processing service fee. An application to replace a green card will cost $365 instead of $290; an immigrant petition for alien worker will cost $580 instead of $475; and an application for employment authorization will cost $380 instead of $340.

The premium processing fee will increase from $1,000 to $1,225. There will be a new fee for a civil surgeon designation of $615, and a new fee of $6,230 for an application for a regional center designation under the EB-5 immigrant investor

pilot program.
USCIS noted that most EB-5-related comments the agency received in response to the proposed rule acknowledged the need for a regional center designation fee. The commenters expressed support for the fee, USCIS said, while also noting the need for improvements in processing times, collaborative efforts, and regulatory development. USCIS said it "continues to strive for improved processing times, has committed to improved stakeholder communications with quarterly stakeholder meetings, and will pursue regulatory development when practical."

Several commenters on the proposed rule expressed concern that USCIS would raise fees during a time when many employment-based adjustment of status filers are experiencing long waits for their visas. USCIS attributed these long waits to visa retrogression in oversubscribed categories, noting that some have attributed it to USCIS processing inefficiencies and questioned a fee hike in the face of such delays. Others have attributed the long waits to the mismanagement of the visa allocation and coordination process between USCIS and the Department of State (DOS), and noted that many numerically limited visa numbers have gone unused.

USCIS said the notion that processing inefficiencies contribute to the long wait for visas "appears unfounded," citing an average processing time of four months for an Application to Register Permanent Residence or Adjust Status, Form I-485. "This timeframe meets the processing goal set forth in the 2008/2009 fee rule," USCIS said, adding that "ignificant improvements have also been made in the visa coordination process between DOS and USCIS." USCIS said that it confers with DOS monthly on pending visa demand, workload capabilities, and forecasting immigration trends. For example, USCIS noted, if its analysis finds a period of low demand in a particular visa preference category, DOS is able to respond by advancing the priority dates rapidly to ensure that all allotted visas will be used in a particular fiscal year. "USCIS and DOS continue to consider ideas and options to further improve the visa coordination process between the two and reduce the occurrence of visa retrogression or future unused numbers," USCIS said.

Some commenters also suggested that USCIS recapture unused visa numbers from recent years as a way to reduce the backlog of pending adjustment of status cases. By recapturing these numbers, they suggested, visa priority cut-off dates would advance, allowing for many new filings and thereby increasing

USCIS revenue without a need to raise fees. USCIS noted, however, that the authority to recapture any unused visa numbers from previous years resides with Congress and is not available to USCIS as an administrative remedy. Moreover, increasing the number of filings concurrently increases the amount of work to be performed, thus consuming the fees generated. “Even if legally possible, this solution would not be practical,” USCIS said.

Due to the long wait for visa numbers in particular categories, several commenters disagreed with a fee hike because costs would rise for intending immigrants either seeking to maintain their status in the U.S. or receiving ongoing interim benefits while awaiting visa numbers. USCIS noted, however, that U.S. employers may not recoup the costs required to file for a nonimmigrant employee or his or her extension or change of status; thus, the costs are borne by the employer and not the intending immigrant seeking to maintain status. Furthermore, USCIS said, applicants for adjustment of status who request advance parole and employment authorization are exempt from payment of additional fees while their I-485s are pending.

USCIS said it acknowledges that employment-based I-485 filers who filed under the old fee structure, before August 18, 2007, must continue to pay fees associated with interim benefits. USCIS noted that it has no control over DOS’s allocation of visa numbers or the yearly visa numerical limits established by Congress, but said the agency is “sympathetic to those who have pending adjustment of status applications in categories experiencing extreme visa retrogression.” To alleviate the burden, USCIS initiated a policy in June 2008 of a two-year validity period on employment authorization documents for these affected individuals, “effectively reducing ongoing costs for the benefit by an estimated 50 percent.” USCIS said it is further adopting a policy whereby “those same affected individuals may receive an advance parole document with a two-year validity period to further alleviate their filing burdens. The number of filers affected by FY 2007 visa retrogression continues to decline as visa numbers are allocated.”

One commenter suggested the creation of a variable fee structure depending on the wait for a visa number. USCIS said this would be impractical.

A number of commenters requested that USCIS offer multi-year employment authorization documents (Forms I-765) and travel documents (Forms I-131). Commenters cited the financial burden of submitting multiple applications for

both services while their adjustment of status cases are pending. Some commenters also mentioned the administrative burden created when trying to time the filing of the documents so as not to produce instances of overlapping validity.

USCIS said it "has no interest in artificially limiting the validity periods of these documents," pointing out that in many instances, these validity periods are directly related to the length of the underlying status that created eligibility for the associated benefits. "For example, a permanent resident who remains outside the United States for more than one year may be questioned on his or her return based on the validity of his or her Permanent Resident Card, Form I-551," USCIS noted. "If that individual applied for a reentry permit before departure from the foreign country, and the application is granted, then the one-year validity of the Form I-551 is extended to two years." USCIS noted that the current two-year validity of the reentry permit matches this period. Issuing it for a longer validity period "could create confusion and result in some permanent residents remaining abroad for too long and potentially jeopardizing their status. The validity period of a travel document or EAD is generally linked to the validity period of the relating immigration status."

The final rule, which contains a table showing the fee changes and additional details on how the new fees were calculated, is available at http://edocket.access.gpo.gov/2010/pdf/2010-23725.pdf. A related announcement, fact sheet, and Q&A are available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=53173dc5cb93b210VgnVCM100000082ca60aRCRD& vgnextchannel= 68439c7755cb9010VgnVCM10000045f3d6a1RCRD, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543 f6d1 a/ ?vgnextoid=5be73dc5cb93b210VgnVCM100000082ca60aRCRD& vgnextchannel= 68439c7755cb9010VgnVCM10000045f3d6a1RCRD, and http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543 f6d1 a/ ?vgnextoid=67b73dc5cb93b210VgnVCM100000082ca60aRCRD& vgnextchannel= 68439c7755cb9010VgnVCM10000045f3d6a1RCRD, respectively.

Back to Top

2. 2012 Diversity Visa Lottery Program Registration Begins in October

The online registration period for the DV-2012 diversity visa lottery begins at 12 noon eastern time, Tuesday, October 5, 2010, and ends at 12 noon eastern time, Wednesday, November 3, 2010. The Department of State strongly encourages applicants not to wait until the last week of the registration period to enter, because heavy demand may result in online delays and missing the deadline.

For DV 2012, entrant notification will be through the Entry Status Check at http://www.dvlottery.state.gov. Entrants selected will receive further instructions in the mail, including information on fees connected with immigration to the U.S. The "Selection of Applicants" section in the instructions provides information about the DV timeframe and process.

The Department's announcement notes that there have been instances of fraudulent Web sites posing as official U.S. government sites. Also, some companies posing as the U.S. government have sought money in order to "complete" lottery entry forms. "There is no charge to download and complete the Electronic Diversity Visa Entry Form. The Department of State notifies successful Diversity Visa applicants by letter, and NOT by e-mail," the announcement notes.

The announcement, with links to the instructions and to DV-2010 and DV-2011 results, is available at http://travel.state.gov/visa/immigrants/types/types_1322.html. The instructions are available at http://travel.state.gov/visa/immigrants/types/types_1318.html.

Back to Top

3. DOS Solicits Comments on Nonimmigrant Treaty Trader/Investor Application

The Department of State has submitted the Nonimmigrant Treaty Trader/Investor Application (DS-156E) to the Office of Management and Budget for approval to extend its validity, and seeks public comments for up to 30 days from September 23, 2010. Copies of the document may be obtained from Stefanie Claus, Office of Visa Services, U.S. Department of State, 2401 E Street, NW, L-603, Washington, DC 20522; telephone (202) 663-2910. Comments should be submitted by one of the methods set forth in the notice, which appears at http://edocket.access.gpo.gov/2010/pdf/2010-23811.pdf.

Back to Top

4. FY 2011 Visa Numbers Available on October 1, 2010; DOS Updates China Reciprocity Schedule

The Department of State sent a memorandum to USCIS on September 15, 2010, noting that effective September 16, there would be no further authorizations of visa numbers for any family preference category, or for employment second, third, third "other workers," fourth, and fourth "certain religious worker" cases for the remainder of fiscal year (FY) 2010. Numbers once again are available for all of these categories as of October 1, 2010, under the FY 2011 annual numerical limitation. The memo stated that USCIS could continue to process the cases received and that they would be held in the Visa Office's "Pending Demand" file. "All eligible pending demand cases will be automatically authorized based on the FY-2011 cut-off dates which are announced."

Also, the Department amended its visa reciprocity schedule for China to allow for 12-month multiple-entry visas for H visa applicants instead of the previous 3-month, 2-entry visa. The updated reciprocity schedule and guide for China is available at http://travel.state.gov/visa/fees/fees_4881.html?cid=3537.

Back to Top

5. DOS Issues Travel Warning for Mexico

The Department of State issued a travel warning on September 10, 2010, to inform U.S. citizens traveling to and living in Mexico about the security situation there. Among other things, the status of authorized departure of family members of U.S. government personnel from U.S. Consulates in the northern Mexico border cities of Tijuana, Nogales, Ciudad Juarez, Nuevo Laredo, Monterrey, and Matamoros ended on September 10 following the expiration of the maximum 180-day period. Based on a security review in Monterrey following an August shooting in front of the American Foundation School in Monterrey and the high incidence of kidnappings in the Monterrey area, U.S. government personnel from the Consulate General have been advised that the immediate, practical, and reliable way to reduce the security risks for all children is to remove them from Monterrey. As of September 10, 2010, the Consulate General in Monterrey is a partially unaccompanied post, meaning no minor dependents of U.S. government employees are permitted to remain in the city. This travel warning supersedes the warning for Mexico dated August

27, 2010, to note the lifting of Authorized Departure status for U.S. Consulates along the U.S.-Mexico border.

The warning, which discusses many other details about the security situation in Mexico and along the border, is available at http://travel.state.gov/travel/cis_pa_tw/tw/tw_4755.html.

Back to Top

6. Dep't of State Updates Guidance on Medical Grounds of Inadmissibility

Following an update by the Centers for Disease Control and Prevention (CDC) to its technical instructions, the Department of State (DOS) has updated guidance in the *Foreign Affairs Manual* (FAM) concerning medical grounds of inadmissibility and issued a corresponding cable to the field.

The cable notes that the CDC updated the Technical Instructions for Physical or Mental Disorders with Associated Harmful Behavior and Substance Related Disorders (2010 MH TIs) effective June 1, 2010. Those instructions supersede all previous guidance on physical or mental disorders and substance related disorders. The major revisions in the 2010 MH TIs include changes to the methods of diagnosis of mental disorders and substance-related disorders, the definition and determination of remission, and the alcohol abuse evaluation. The DOS cable includes updates to 9 FAM resulting from this change to the technical instructions.

The CDC's updated technical instructions for panel physicians are available at http://www.cdc.gov/immigrantrefugeehealth/exams/ti/panel/mental-panel-technical-instructions.html. The updated portion of the FAM is available at http://www.state.gov/documents/organization/86936.pdf.

Back to Top

7. USCIS Discusses Effects of Invalid Puerto Rico Birth Certificates on I-9 Process

On July 1, 2010, the Vital Statistics Office of the Commonwealth of Puerto Rico began issuing new, more secure certified copies of birth certificates to U.S. citizens born in Puerto Rico because of a new Puerto Rico birth certificate law. After September 30, 2010, all certified copies of Puerto Rico birth certificates issued before July 1, 2010, will become invalid. However, U.S. Citizenship and Immigration Services (USCIS) noted in recent guidance that employers should not re-verify the employment eligibility of existing employees who presented a

certified copy of a Puerto Rico birth certificate for I-9 purposes and whose employment eligibility was verified on the I-9 before October 1, 2010.
USCIS noted that the new law does not affect the U.S. citizenship status of individuals born in Puerto Rico. It only affects the validity of certified copies of Puerto Rico birth certificates. The guidance notes:

New Employees

- All certified copies of Puerto Rico birth certificates are acceptable for Form I-9 purposes through September 30, 2010.
- Beginning October 1, 2010, only certified copies of Puerto Rico birth certificates issued on or after July 1, 2010, are acceptable for Form I-9 purposes.
- Beginning October 1, 2010, if an employee presents for List C a birth certificate issued by the Vital Statistics Office of the Commonwealth of Puerto Rico, the employer must look at the date that the certified copy of the birth certificate was issued to ensure that it is still valid.

Existing Employees

Employers must not re-verify the employment eligibility of existing employees who presented a certified copy of a Puerto Rico birth certificate for Form I-9 purposes and whose employment eligibility was verified on Form I-9 before October 1, 2010.

Federal Contractors

Employers awarded a federal contract that contains the Federal Acquisition Regulation (FAR) E-Verify clause have special Form I-9 rules for the verification of existing employees.

- **If completing new Forms I-9 for existing employees,** certified copies of Puerto Rico birth certificates are acceptable as a List C document under the following circumstances:
    - Until October 1, 2010, all certified copies of Puerto Rico birth certificates are acceptable for Form I-9 purposes.
    - Beginning October 1, 2010, only certified copies of Puerto Rico birth certificates issued on or after July 1, 2010, are acceptable for Form I-9 purposes.

- **If updating existing Forms I-9,** an employer must not ask an employee to present a new certified copy of a Puerto Rico birth certificate if the employee presented a certified copy of a birth certificate issued in Puerto Rico before July 1, 2010 that was valid and acceptable for the Form I-9 at the time it was presented.
  See the E-Verify *Supplemental Guide for Federal Contractors* for more information on E-Verify and FAR requirements.

How will this law affect the retention of documents with Form I-9?

The new law prohibits Puerto Rico employers from keeping original certified copies of birth certificates issued in Puerto Rico but allows employers to keep photocopies of these documents. Employers who choose to make photocopies of documents that their employees present when completing Form I-9 must do so for all employees, regardless of national origin or citizenship status.

The USCIS guidance, released on September 9, 2010, is available at http://www.uscis.gov/portal/site/uscis/menuitem. 5af9bb95919f35e66f614176543f6d1a/?vgnextoid=45e3285ca77fa210VgnVCM100000082ca60aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD.

Back to Top

8. ICE Approves Special Relief for Certain F-1 Haitian Students

U.S. Immigration and Customs Enforcement (ICE) has approved special relief for certain F-1 Haitian students who have suffered severe economic hardship as result of the January 12, 2010, earthquake in Haiti. This relief applies only to students who were lawfully present in the United States in F-1 status on January 12, and enrolled in an institution that is certified by ICE's Student and Exchange Visitor Program.

The suspension of certain regulatory requirements allows eligible Haitian F-1 students to obtain employment authorization, work an increased number of hours during the school term and, if necessary, reduce their course load while continuing to maintain their F-1 student status.

F-1 students granted employment authorization by means of the notice will be deemed to be engaged in a full course of study if they meet the minimum courseload requirements specified in the notice.

"We want to ensure that students from Haiti, who were here at the time of January's tragic events, are able to concentrate on their studies without the worry of financial burdens created by the devastation of the earthquake," said Louis Farrell, director of the Student and Exchange Visitor Program. "These students have the full support of SEVP and designated school officials for assistance."
ICE manages SEVP and the Student and Exchange Visitor Information System.

An ICE press release announcing the relief is available at http://www.aila.org/content/default.aspx?bc=1016%7C6715%7C12053%7C26286% 7C32985.

Back to Top

9. U.S. Mission in Canada Announces New Appointment Service for Visa Applicants Coming to U.S.

The U.S. Mission in Canada is transitioning to a new appointment service for applicants applying for a visa to come to the United States. As of September 1, 2010, all services, including calling for information and scheduling an appointment, are being provided at no additional cost, with no requirement that applicants pay phone charges or use PIN numbers to access such services. Applicants should go to http://www.usvisa-info.com/en-CA/selfservice/ss_country_welcome to obtain information online or via telephone on how to start their application for a U.S. visa at a consular section in Canada.

Beginning September 1, 2010, applicants must pay their machine-readable visa (MRV) fee before scheduling an appointment. If the applicant has paid the MRV fee before September 1, 2010, but has not scheduled an appointment, there is a grace period from September 1, 2010, until October 1, 2010 during which the applicant can still use the MRV fee for appointment scheduling. If the applicant does not schedule an appointment before October 1, 2010, he or she will have to pay the MRV fee again through the new service to schedule an appointment.

The announcement and related links are available at http://www.consular.canada.usembassy.gov/new_appointment_service.asp.

Back to Top

10. ABIL Global (www.abil.com): Repercussions of the Global Economic Crisis on Mexican Immigration Policies

Due to Mexico's close interconnection with the United States, the economic crisis has begun to have a significant and profound effect on the domestic economy in Mexico. There have been no specific changes in the immigration laws in Mexico thus far; however, immigration authorities have become stricter in their adherence to one immigration law in particular that regulates the proportion of Mexican and foreign employees in a company legally established in Mexico.

The number of foreign employees in a company in Mexico is regulated by the corresponding legal immigration guidelines. This restriction is established in Article 7 of the Federal Labor Law, which is also supported by Article 123(A) of the Mexican Constitution regarding the rights and obligations of employees. This legal disposition restricts the percentage of foreigners working in a company to a maximum of 10 percent of the total workforce to allow for greater job opportunities for Mexican personnel in areas such as industrial production and other business sectors. Under these terms, a company or establishment's workers must be 90 percent Mexican.
Some important points to highlight include:

1. In the technician and professional categories, all workers must be Mexican, except when Mexican personnel with a particular specialization are not available. Under this scenario, foreigners may be authorized on a temporary basis in a proportion that does not exceed 10 percent of such specialists.
2. The supervisor and foreign workers must have a sole obligation to the Mexican workers in such areas of specialization. The purpose of this policy is to train Mexican personnel in areas in which they do not have expertise or knowledge. In this manner, the domestic trained labor force is expected to grow and to continue to become more specialized in coordination with the foreign labor force.
3. Medical doctors who provide their services to companies in Mexico must all be Mexican.
4. All directors, administrators, and general managers are exempt from inclusion in the total computation of the proportion of Mexican to foreign workers. This is because these positions are considered to be key positions and essential to the development of business for the company in Mexico.

Mexican immigration authorities are very particular about the application of this immigration policy, now more than ever. Currently, they allow no flexibility in the percentages mentioned in this article. The main purpose of this regulation is to protect the domestic labor force from being displaced in a disproportionate manner by the foreign work force, especially in these times of economic uncertainty.

Back to Top