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Immigration Newsletter

Issue No. 5 (December 2010)

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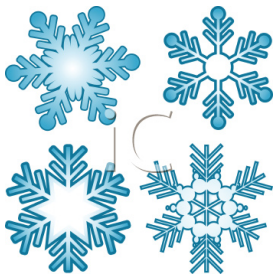
Office Holiday Hours



We want to remind our clients that over the holidays, our office will closed on December 27th and the 31st, 2010. We also will close at noon on December 24.

We hope your holiday season is happy and safe.

Immigration and the 112th Congress

The ramifications of the November 2 elections that saw the GOP win tremendous gains in Congress are still unfolding. What will be the legislative priorities of the new Republican-controlled House? How will Obama and the Democrat majority in the Senate work with the House on various issues and forge bipartisan cooperation? Will gridlock prevail? Despite these uncertainties, one thing is for certain: the prospects for immigration reform will be dramatically and adversely affected by this recent shakeup.

The 112th Congress will have a markedly different composition than its previous iteration. The House

will flip from a 76-seat Democrat majority to a 50-seat Republican majority with some of the new seats being controlled by hard-line immigration conservatives. Meanwhile, the Senate will remain under Democrat control, but with a slimmer majority then what it enjoyed during the 111th Congress, with losses sustained by veteran pro-immigration senators.

With these changes comes a shakeup in the leadership and committee memberships. In the House, several crucial leadership positions are set to change hands when Congress is sworn in on January 5, and the Republicans become the party in power. The most visible change will come as Nancy Pelosi (D-CA) hands over the gavel as Speaker of the House to John Boehner (R-OH), who will now set the House's agenda and decide when to take up which issues. To say Rep. Boehner has been less than complimentary about comprehensive immigration reform is an understatement.

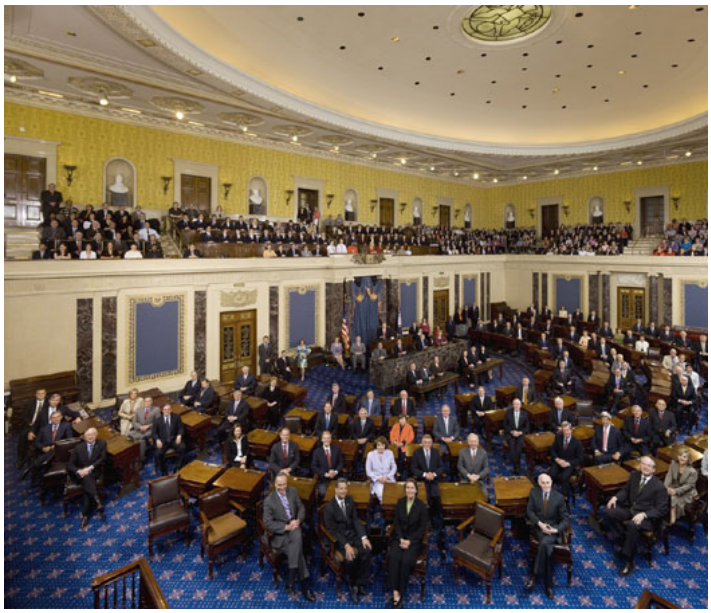


Photo: U.S. Senate, 110th Congress, Senate Photo Studio

Rep. Lamar Smith (R-TX) has been tapped to take over as Chair of the House Judiciary Committee, the committee that oversees immigration. Rep. Smith has led the fight against immigration reform for nearly two decades and is the architect of some of the most unforgiving provisions in current law. In turn, he is widely expected to appoint Rep. Steve King (R-IA) to chair the House Subcommittee on Immigration. Representative King is a Tea Party conservative who relied heavily on virulent anti-immigrant rhetoric during the campaign, so his control over the Immigration Subcommittee is a significant obstacle to real progress. Rep. King is also on record favoring a constitutional amendment to the 14th Amendment to keep children of undocumented aliens from becoming U.S. citizens by birth, and has voiced support for the Arizona law, S.B. 1070, a draconian law that created a storm of controversy when it was enacted last May. Both Smith and King have called for tough enforcement measures and have been fierce critics of legalization proposals. In addition, they are likely to conduct oversight hearings demanding that the Obama Administration prosecute more aggressively the immigration laws on the books.

While it's hard to find a pro-immigration spin to the results in the House, the outcome in the Senate offered a bit more cause for optimism. The Hispanic and largely pro-immigration voting bloc was held largely responsible for Senate Majority Leader Harry Reid keeping his Nevada seat as well as the seats of other pro-immigration candidates — Patty Murray (D-WA), Michael Bennet (D-CO), and Barbara Boxer (D-CA) — whose races were some of the closest this year. These victories underscore the significance of the Latino vote and signal to both parties that campaigns fueled by anti-immigrant rhetoric do not guarantee results at the polls. Fortunately, the Senate immigration leadership positions are not likely to change. Senator Reid will remain Majority Leader and Chuck Schumer (D-NY) is expect to remain chair of the Immigration Subcommittee.

All told, those who oppose comprehensive immigration reform and other pro-immigration legislation will hold a strong and loud voice with tremendous power in the 112th Congress. But, with a President still committed to comprehensive immigration reform, a pro-immigration, majority leadership in the Senate, and a populace moderate on immigration, the prospects for positive immigration reform legislation — perhaps more likely piecemeal than comprehensive — are not entirely lost.

H-1B Visas Still Available

Following years of extremely high demand, 2010 is proving to be a very slow year for H 1B visa petitions. This is good news for businesses hoping to add foreign professional workers over the next several months and their prospective employees.

As of December 10, the U.S. Citizenship and Immigration Services (USCIS) reports having accepted 52,400 H-1B visa petitions out of the 65,000 visas that are available each year. Another 900 visas are still available for those foreign nationals who are eligible to file under the "master's cap," which provides for an additional 20,000 visa numbers annually. For several years before the 2008 economic downturn, all H-1B visa numbers were exhausted the first day they became available. In 2009, the cap was reached on December 24.

If you are considering sponsoring a foreign worker in the near future, now is a good time to do so while visa numbers remain available. Once the cap is reached for FY 2011, employer-petitioners and their prospective employees will have to wait until October 1, 2011 to commence new H-1B work.

"Deemed Export" Attestation by Employers To Be Required on Certain I-129 Petitions

BREAKING NEWS: On December 22, 2010, USCIS announced that the effective date for complying with this new requirement will be extended to February 20, 2011.

Beginning December 23, 2010, a new "deemed export" attestation will be required on Form I-129 nonimmigrant visa petitions for H-1B, H-1B1 (Chile/Singapore), L-1, and O 1A petitioners. The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) require U.S. persons to seek and receive authorization from the U.S. government before releasing controlled technology or technical data to foreign persons in the United States. Under both the EAR and the ITAR, release of such information to a foreign national — even by an employer — is deemed to be an export to that person's country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. government before it releases controlled technology or technical data to its nonimmigrant workers employed as H-1B, L-1, or O-1A beneficiaries. While these licensing requirements will affect only a small percentage of employer-petitioners because most types of technology are not controlled for export or release to foreign persons, a new certification attestation will be included on Form I-129. Most employers will simply certify that no license is required, but if an export license is required, then the employer must further certify that it will not release or otherwise provide access to controlled technology or technical data to the foreign national until it has received the required governmental authorization to do so.

For many years now, companies as well as universities have been required to comply with export control laws, but compliance is generally not managed by the same units that prepare I-129 petitions. Even though many activities at companies and universities can benefit from several exclusions to the export license requirement (e.g., the "basic research" exemption), to properly complete the new deemed export attestation on Form I 129, the petitioner would first have to inquire with the appropriate office at his or her company or university that handles export control issues. It would behoove these institutions to develop an institutional protocol for completing the form and assuring the signatory of the I-129 that their attestation is true and correct. Employers considering sponsoring foreign workers should familiarize themselves with these laws and discuss with immigration counsel their impact on future visa petitions.

The technology and technical data that are controlled for release to foreign persons are identified on the EAR's Commerce Control List (CCL) (generally "dual use" items) and the ITAR's U.S. Munitions List (USML) (generally defense-related articles). The CCL is found at

www.access.gpo.gov/bis/ear/ear_data.html#ccl; the USML at www.pmddtc.state.gov/regulations_laws/itar.html. Additional information about applying for the appropriate licenses can be found at www.bis.doc.gov/deemedexports and www.pmddtc.state.gov/faqs/license_foreignpersons.html.

PERM Labor Certification Program

Photo: USgov

Most foreign nationals who wish to be eligible for employment-based green cards must do so through the PERM labor certification process by having their employer file a labor certification application with the Department of Labor (DOL). The PERM application certifies that there are no U.S. workers who are willing, able, or available to fill a position offered by an American employer, and the employer must undertake extensive recruitment to prove such. The PERM application also certifies that the employer will pay the sponsored employee the prevailing wage for the job. Once approved or "certified," the foreign-national employee can petition USCIS for eligibility under one of the employment-based preference categories by filing an I-140 immigrant visa petition.

The largely automated PERM program was introduced in March 2005 and touted by DOL as a new and retooled expedited labor certification process through which employers could begin their sponsorship of valued employees. Nevertheless, the PERM process remains laborious and complicated.

Over the past five years through the issuance of FAQs — DOL's 11th and latest was issued in August — DOL has retroactively applied new rules to old cases and used the informal FAQ process to create or change its requirements. By forgoing the more formal route of promulgating regulations, which would afford public comment and mandate government consideration, the program remains riddled with deficiencies and uncertainties for employers. Moreover, the application takes about four to six months to prepare, plus another nine to ten months for processing by DOL (from online submission to adjudication). And, if DOL requests that the employer's recruitment and other records be audited, another 15 months will be tacked on for a DOL audit response. Beyond the changing rules and lengthy processing times, perhaps the most disheartening aspect of the process is how unforgiving it is — even the tiniest error on the PERM application can completely derail a case.

So why do employers and their employees bother? Despite these and other hurdles inherent in the PERM labor certification process, this route to permanent residence is often the only viable option for many needed employees. And, the process eventually works: long-time nonimmigrant employees and their families can become green card holders and, later, citizens of the United States. However, employers who anticipate long-term sponsorship of current employees must take particular care to ensure consistency throughout what can be a multi-process, nine- to ten-year immigration odyssey. This can be difficult, especially when the immigration laws are not consistent. For example, a foreign national can be a "professional" for H-1B purposes on the basis of experience and education but not for immigrant visa purposes. Employers also must take care to timely file their PERM applications, especially when their H-1B employees are approaching their final year of their visa status. Indeed, long-term immigration strategies must be considered when hiring H 1Bs.

Until this system changes, employers and their immigration counsel should actively review pending cases to determine whether additional documentation is required to meet ever-changing DOL requirements. Counsel and employers also are advised to determine from the start the best short- and long-term strategies for their employees.

Supreme Court and Undocumented Workers — Another Arizona Law Being Tested

The Supreme Court heard oral arguments in early December on a controversial 2007 Arizona law that would revoke the business license of companies who knowingly hire undocumented workers. The legislation, known as the Legal Arizona Workers Act, is being challenged by a coalition of business groups who argued that the law intrudes on the exclusive jurisdiction of the federal government over immigration. While both sides agree that the federal government, through the 1986 Immigration Reform and Control Act (IRCA), preempted states from enacting legislation that would use employer sanctions to control immigration, Arizona has argued that a parenthetical clause in IRCA allows states to act "through licensing or similar laws."

The case, while important in its own right, also is being watched closely because it could give some indication on how willing the Justices are to allow states to pass legislation to curb undocumented immigration. In particular, it may serve as a bellwether for a Supreme Court challenge to the high-profile Arizona law passed earlier this summer requiring local law enforcement officials to check the immigration status of anyone they suspect of being in the country without legal status. That law — S.B. 1070 — garnered extensive, national media attention and spurred protests across the country when Governor Jan Brewer signed it into law in May. S.B. 1070 is currently moving through the courts as the Obama Administration challenges its constitutionality. It is expected to reach the Supreme Court during the 2011 or 2012 term.
tional challenges. Stay tuned.

Misuse of Social Security Number Considered a "Crime Involving Moral Turpitude," Eighth Circuit Rules

The U.S. Court of Appeals for the Eighth Circuit recently joined two other circuits in ruling that a conviction for misuse of a Social Security number is a "crime involving moral turpitude," and has the effect of precluding foreign nationals from becoming lawful permanent residents. In a unanimous decision, the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota) rejected an appeal to cancel the deportation of a Salvadoran man who was found guilty of misusing a Social Security number, labeling his act a "crime involving moral turpitude" (CIMT). A CIMT, unlike most misdemeanors and some felonies, makes a foreign national inadmissible (ineligible to enter the United States) as well as deportable (removable from the United States if already here).

In categorizing the misuse of a Social Security number as a CIMT, the Eighth Circuit adopts the approach long held by the Board of Immigration Appeals (BIA), the administrative appellate court that hears appeals from decisions of the immigration courts. The Sixth and Ninth Circuits have also previously adopted this interpretation; however, not all courts of appeals have. Thus, not all foreign nationals who appeal their cases will be governed by this interpretation.

Clearly, misuse of Social Security numbers can have drastic consequences. Foreign nationals who may be subject to application of this category are encouraged to contact immigration counsel to discuss the possible ramifications on their case.

Best Wishes to you in 2011 from everyone at Hochstatter, McCarthy, Rivas & Runde!

NOTICE: This newsletter is intended to provide you with general information about current U.S. immigration issues. The information in this newsletter is not legal advice about your specific matter. If you have questions about your case, you should contact your immigration attorney.