THOMAS C. HOCHSTATTER
GAIL K. McCARTHY
JOSEPH M. RIVAS
MICHAEL C. RUNDE

KELLEY A. CHENHALLS
JENNIFER L. NISSEN
PRIYA M. BHATIA

HOCHSTATTER, McCARTHY, RIVAS & RUNDE, S.C.

IMMIGRATION ATTORNEYS

TELEPHONE (414)962-7440
FAX (414)962-0353
www.hmrvisa.com

Legal Assistants:
GILLIAN A. STEWART
RUTH D. INGRAHAM

Immigration Newsletter

Issue No. 6 (February 2011)

This Month's Contents:

New, Combined EAD / Advance Parole Card for I-485 Adjustment Applicants Announced by USCIS

U.S. Citizenship and Immigration Services (USCIS) has announced that it is now issuing a single, dual-purpose card combining the employment authorization document (EAD) and advance parole travel authorization for certain applicants who have pending family- or employment-based adjustment of status applications (Form I-485). This is welcome news and a significant improvement from the current practice of issuing the two documents separately — often at different times. For many adjustment applicants, the inability to plan travel abroad during the pendency of their advance parole application produces great consternation. Now, adjustment applicants can plan travel with more predictability because issuance of the new card presumably will be governed by the 90-day regulatory period for employment authorization documents (EADs). Under current regulations, EADs must be issued within 90 days from the time of filing, but no corresponding regulation mandates the issuance of advance parole.

Under this new policy, applicants may receive the combined card when they file both an application for employment authorization (Form I-765) and an application for travel document (Form I-131). Both forms must be filed at the same time to receive the new card.

For those who already have an EAD and a separate

travel document with a different expiration date, USCIS advises, applicants may receive the new card only if both documents have less than 120 days of validity left or if the EAD has less than 120 days of validity left and the advance parole document is for a single entry only. Those wishing to apply for the new card are advised to wait until they are within 120 days of the expiration of their current work authorization card. The validity period for the combined card will begin on the date both applications are adjudicated. The fee for the card, if applied for separately from the adjustment application, is $740. Not all applicants are eligible for the combined card, and USCIS advises that it will continue to issue separate EADs and advance parole documents as warranted.

As with the current advance parole document, obtaining a combined advance parole and employment authorization card allows an adjustment applicant to travel abroad and return to the United States without abandoning his or her pending adjustment application. Upon returning to the United States, the individual must present the card to request parole through the port-of-entry. The decision to parole the individual is made at the port-of-entry.

The new card will look similar to the current EAD but will include text, "Serves as I-512 Advance Parole." The card is obviously more secure and more durable than the paper advance parole document currently in use.

H-1B Professional Visa Cap Reached

On January 26, USCIS announced that it had received a sufficient number of cap-subject H-1B temporary professional visa petitions for employment commencing during the current fiscal year (October 1, 2010 to September 30, 2011). Cap-subject employers seeking to employ new professional workers now must wait until April 1 of this year to file new petitions for employment commencing October 1, 2011.

Under the immigration laws, visas for professional specialty workers are capped at 65,000 per fiscal year. Another 20,000 visas are available to workers with advanced degrees (masters or higher) obtained at U.S. institutions of higher education. Of the total 85,000 H-1B visas available, some 6,800 visas are set aside each year for nationals of Chile and Singapore (a maximum of 1,400 for Chile and 5,400 for Singapore). While not all H-1B applicants are subject to the cap, the vast majority in business are.

For the second year in a row, H-1Bs remained available for some 9–10 months after the U.S. government began accepting applications. Even in 2009, with the recession beginning to take hold, employers snapped up the 65,000 visas available in just one day, as they had for the past several years. While the weakened economy no doubt has played a significant role in lessening the demand for the once-coveted visa, more recently companies have become increasingly reluctant to petition for foreign workers in the face of rising costs and greater governmental scrutiny. In the past two years, several disincentives for H-1B visas were put into place. These include the USCIS:

- appreciably altering its definition of what constitutes a valid employer-employee relationship;
- adding fees for H-1B "dependent employers;"
- requiring companies that received TARP federal bailout funds to prove they have tried to recruit American workers at prevailing wages and that foreigners are not replacing U.S. citizens; and
- effective February 20, requiring that H-1B employers attest that they are in compliance with the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR) regarding the release of controlled technology or data. (See News in Brief for more information about the new "deemed" export rule.)

Even though the cap has been reached for this fiscal

year, some H-1B petitions can still be filed because they are exempt from the numerical cap. These include petitions for physicians with certain J waivers, as well as petitions filed by institutions of higher education or related or affiliated nonprofit entities, by nonprofit research organizations, or by governmental research organizations. Also, petitions filed on behalf of current H-1B workers who have previously been counted against the cap are not counted again. This means H-1B petitions for extension of status, change of employment, or concurrent employment may be submitted at any time.

Family-Based Immigrant Visa Backlogs Continue to Increase

Close family members of green card holders and U.S. citizens, who already are used to the long queue for their visas, will now have to wait even longer. The March 2011 Visa Bulletin, the official Department of State publication establishing visa availability and cut-off dates, reports that heavy demand for visa numbers has required categories to continue to retrogress. The Family F2A category (spouses and children of lawful permanent residents) has been particularly impacted, with a cut-off date of January 1, 2007, for all countries except Mexico (where the cut-off date is January 1, 2006). Compare these dates to the cut-off in December 2010, when the F2A category was at August 1, 2010, for all countries expect Mexico.

On the employment-based side, no significant changes are reported in the March Visa Bulletin, with numbers slowly inching forward for most categories. Still, professional visas remain seriously backlogged — more than five to eight years — and master-level visas remain backlogged for more than five years for foreign nationals from India and China.

Only Congress has the authority to reduce these long, long waits through ameliorative legislation. How long can America expect these highly skilled professionals to wait? How long can close family members be separated?

New I-9 Handbook Addresses H-1B Portability and Nonimmigrant Extensions of Status

USCIS recently issued new guidance for employers on the process of completing Form I-9, or employment eligibility verification, by issuing an updated version of The Handbook for Employers. Some of the most important changes address the issue of "portability," or transferring an H-1B employee to another employer, and pending extension of status petitions. The Handbook now provides that an employee in valid H-1B status who ports to a new employer can begin to work with the new employer upon filing an H-1B petition with USCIS. Previously, the H-1B employee would have to wait to receive an I-797 receipt notice prior to beginning work with the new employer, which could take weeks or even months to arrive. With respect to extensions, the Handbook provides that an employee with a timely filed extension of status petition — in other words, a petition filed before the employee's work authorization expires — is eligible for continued work authorization for up to 240 days beyond the expiration date of that authorization, as long as the extension remains pending. The Handbook provides a detailed explanation on how to complete the Form I-9 and the documentation to be attached for individuals in H, E, L, O, and P status.

Employers are encouraged to consult the new Handbook when reviewing their company's I-9 compliance procedures. All employers must complete Form I-9 for every worker hired after November 6, 1986, and those with multiple foreign-national employees are encouraged to establish formal I-9 audit and compliance plans. A link to download the Handbook can be found at www.uscis.gov/i-9.

The 112th Congress and Immigration: What's the Latest?

The 112th Congress ushered in a sea change in the composition and balance of power in Washington and with a clear message that immigration enforcement will be the centerpiece of any and all Republican efforts to deal with immigration. The session began with a bang when the Republican House leadership named

Elton Gallegly (R-CA) — rather than Steve King (R-IA) — to chair the House immigration subcommittee. King had been the ranking Republican on the subcommittee last session, and it was viewed as a "snub" that he did not get the nod for this chairmanship. Rep. Gallegly consistently has been one of the fiercest immigration hawks in Congress for over 20 years.


Photo: U.S. House of Representatives, 112th Congress

As chair of the immigration subcommittee, Rep. Gallegly hasn't wasted any time getting to the business of his committee. Numerous hearings have been scheduled and reports have been commissioned focusing on enforcement — at the border, in the workplace, and in the courts. Most recently, at a February 10 hearing, Chairman Gallegly said he plans to introduce a bill to mandate the use of E-Verify for all businesses within the next month. E-Verify is a database system through which employers can check the work authorization of their employees. The database system, however, is not without flaws.

While President Obama has openly spoken in favor of comprehensive immigration reform, the actions of his Administration thus far appear to more closely resemble the Republican's enforcement-first strategy. The Administration deported a record number of individuals in 2010 — nearly 400,000, which eclipsed the previous record set by President Obama in 2009 and the Bush Administration before him. Yet, at the same time, President Obama continues to talk publicly of his support for the DREAM Act as well as for a broader comprehensive immigration reform package. The DREAM Act enjoyed wide support in the previous Congress, but ultimately failed to pass in the waning days of December's lame-duck session. In his State of the Union address, President Obama again reiterated his call to allow young people who were brought to the United States as undocumented minors to earn their citizenship through attending college or enlisting in the military. Above all else, the President appears to view immigration as an economic imperative and one of the mechanisms that can help bring the country out of the current economic situation.

Meanwhile, the lack of federal action leaves a vacuum that many state legislatures are attempting to fill. One of the trends with new legislatures across the country has been legislation that would make participation in the federal E-Verify program mandatory on the state level. Three states — Arizona, South Carolina, and Mississippi — recently passed such laws and at least 15 others have similar bills at various stages in the legislative process. Further, a number of hard-line state legislators across the country have introduced bills attempting to curtail or eliminate birthright citizenship through state action. While most experts agree that attempts to restrict birthright citizenship will be unsuccessful without an amendment to the U.S. Constitution, such efforts are worth keeping an eye on, if only to gauge the immigration temperature at the state level.

Interviewed for Naturalization But Still Waiting? Consider Filing a Mandamus Suit

Many applications for naturalization remain undecided by USCIS even after the applicant has been interviewed. This may happen because USCIS cannot obtain the needed FBI name check or simply because of administrative inefficiencies.

However, a special provision of the immigration laws permits many such applicants to file a "mandamus" action in federal district court to compel USCIS to act. The case must be pending for at least 120 days after the interview before an action can be filed.

Filing a naturalization mandamus action is relatively

easy, inexpensive, and achieves results — it gets the case decided. That's because U.S. Attorneys don't like them and judges don't like them. U.S. Attorneys don't like to appear before a judge on a matter than should have been decided administratively; judges consider them a waste of value judicial resources.

Typically, upon service of the law suit, the U.S. Attorney contacts the local USCIS attorney in charge of naturalization applications and requests that the case be adjudicated. The USCIS counsel directs an adjudicator to review the case and make a decision. Mandamus actions usually result in the case being decided in two to six months. While mandamus does not guarantee a favorable decision on the naturalization application, it does compel that a decision be made.

If you've had your naturalization interview and more than 120 days have passed without a decision, contact our firm to discuss how a mandamus action can help you.

News in Brief

The following additional items may be of interest to our readers:

March 1 is the Deadline for New Passport Application Forms: The Department of State has unveiled a series of new forms for passport applications that will replace all previous versions, effective March 1, 2011. For more information and to download the new forms, see www.travel.state.gov/passport/passport_1738.html.

"Deemed" Export Attestation for L-1, O-1A, and H-1B Employers: Beginning February 20, employers filing for L-1, O-1A, and H-1B petitions will be required to attest on the Form I-129 nonimmigrant visa petition that they are in compliance with the Export Administration Regulations (EAR) and International Traffic in Arms Regulations (ITAR) regarding the release of controlled technology or data. USCIS previously had announced that this new attestation would be required as of December 2010 but postponed the start date for two months. The EAR and ITAR prohibit the release or "export" of certain technology and technical data to foreign nationals in the United States without authorization from the U.S. government. For more information about what is required of employers, see our December 2010 e-Newsletter and guidelines at www.bis.doc.gov/deemedexports; www.access.gpo.gov/bis/ear/ear_data.html#ccl; and at www.pmddtc.state.gov/regulations_laws/itar.html.

New IRS Rules for Nonresident Foreign Nationals Change How Compensation is Reported: The IRS has issued new instructions for nonresidents filing W-4 (Employee's Withholding Allowance Certificate) forms. The new instructions are intended to better reflect restrictions on deductions, limitation of dependents, and other aspects of filing in nonresident status. The new instructions are available at www.irs.gov/pub/irs-pdf/n1392.pdf.

Aggrieved Travelers Have Redress Mechanism for Certain Problems When Seeking Entry to the United States: The Department of Homeland Security's Travel Redress Inquiry Program (TRIP) is available to individuals who experience delays during their travel screening at U.S. airports, train stations, and other ports of entry. DHS TRIP is aimed to assist travelers who have been repeatedly identified as requiring additional screening due to erroneous information in their DHS security background. See www.tsa.gov/travelers/customer/redress/index.shtm.