



## ICE LAUNCHES I-9 AUDITS

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Dear Client:

I could not wait to September to send the September update - so much is happening in Immigration Law lately. Not too much of it is good . . .

### H-1B Numbers Hold Out, but DOL Bungles LCAs

As you recall, every fiscal year 65,000 "cap-subject" H-1Bs are available, plus 20,000 for U.S. advanced degree holders. This fiscal year (2009/10), fewer than 45,000 cap-subject H-1Bs have been received, leaving 20,000 still available. This count has not changed much since April when the filing period started. Obviously, the economy has affected H-1B filings as expected.

However, this is good news for those who now have jobs for H-1B workers - you can still file for them for any job starting October 1, 2009 or later.

The bad news? Dept. of Labor, which is charged with administering the labor condition application program, has implemented a new "iCert" program. Rather than the fabulous electronic filing system that we had - where LCAs were approved in a matter of seconds if completed correctly - we now have a dysfunctional system that is delaying H-1B filings for weeks.

The point of the new system was to allow for human review of the LCAs to prevent fraud. We knew this would take longer, but no one expected the lack of functionality we are experiencing.

Because of a technical problem, the iCert system cannot verify tax ID numbers of many companies (even large, well-established companies). This results in a denial of the LCA. We then have to file information to verify the tax ID number with DOL. Once they verify this, we have to RE-FILE the LCA - they will not just approve the wrongly-denied one. This process can take days or weeks.

Bottom line: If your company anticipates filing H-1Bs in the future, we suggest that you FILE LCAs NOW for expected positions. Just like in the "good old days" of manually-filed LCAs, there is no need to have a person identified for an LCA,

and you can indicate a range of salaries and designate multiple positions. The LCA is valid for up to 3 years (as you specify).

If you have a valid LCA approved for a position, you can then plug the H-1B beneficiary into the approved LCA (and of course keep track of how many positions have been used on an LCA).

We would be happy to help you figure out a strategy that can work for your company so that a critical H-1B hire will not be delayed.

More H-1B Woe . . .

Just a head's up to those filing H-1Bs: The Immigration Service has an RFE problem this year. "RFEs" are "requests for evidence". They are issued when the examiner believes that more information is needed to properly decide the case. Usually we do not receive them for common H-1B applications, such as for computer professionals. But this year, the majority of cases filed have received RFEs, and we have heard the same news from attorneys throughout the U.S. We can overcome the RFEs but it has added to the H-1B cost and hassle for many clients. I am involved in liaison efforts with the government through the American Immigration Lawyers Association, and we are working to help resolve this issue. We are also adjusting our filing packets to make even more abundantly clear that the H-1B should be approved the first time. But even so, this is not guarantee that an RFE won't be issued.

R-1 Premium Processing Resumed

R-1 petitions for religious workers and ministers may now be filed with the additional \$1,000 premium processing fee for adjudication in 15 calendar days IF the employer has been subjected to a site visit inspection previously. Please keep in mind that the religious worker category is sun-setting Sept. 30, but we hope it will be extended as in years past. The religious minister category is permanent in the law.

EB Priority Dates

Per the August 2009 Visa Bulletin, the cut-off date for both the China-mainland born and India EB-2 categories is October 1, 2003, almost a four-year jump from last month. We are following up on any cases that have now become current so that our clients have the best chance of being approved while the numbers are available.

The third preference and "other workers" employment-based categories remain 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 (which ends Sept. 30). The EB-3 category for India could remain unavailable indefinitely.

Last month the Dept. of State announced that the India and China EB-2 categories could become unavailable in August or September and remain unavailable indefinitely. DOS explained that there is a backlog of at least 25,000 India EB-2 cases awaiting visa numbers. Without legislative relief, the waiting time for Indian EB-2 applicants might be measured in years or even decades, according to DOS.

Demand for EB-4 (religious workers and ministers) is also high, possibly requiring a the establishment of a cut-off date, or the category becoming "Unavailable" for September. It is expected to return to "Current" in October, the first month of the new fiscal year.

This news is disturbing for applicants and highlights the urgent need for immigration reform.

#### Federal Contractors

It appears the Obama Administration intends to fully implement the e-Verify rule for federal contractors. The target effective date is September 8. As you may recall, this rule was challenged in court, but so far, no injunction against implementation has been issued.

This rule affects companies who are contractors with the federal government under the Federal Acquisition Rules (FAR). Language requiring the contractor to use e-Verify on all new and existing employees who will be working directly on a federal contract will be inserted into contracts after the effective date.

A phase-in period is allowed for initial implementation. We can provide detailed instructions if this rule will affect your company.

#### No-Match Rule to be Rescinded

Back in the good news department, the Obama Administration is giving up on ICE "no-match" regulation. The no-match saga began when ICE (the immigration enforcement agency) figured out that the Social Security Administration was sending letters to employers who were reporting wages for SSNs that did not match SSA records. The reason was to clear up SSA records and attribute withholdings to the right person.

ICE decided this would be a good way to catch knowing hire violations. So they issued a regulation providing strict and, in my opinion, unreasonable guidelines for companies to address the immigration status questions raised when a no-match letter was received.

Much push-back and federal litigation ensued. After several rounds by the Bush Administration, the Obama Administration finally decided it was a losing battle. No word whether SSA will begin to issue no-match letters again.

If they do, please remember that a no-match letter still has immigration consequences. Just because ICE doesn't have a formal rule does not mean they will disregard how a company responds to a no-match letter. If you receive one, please contact us to help you work through it to avoid later ICE problems.

### New Visa Application Form Being Implemented

The Dept. of State is phasing-in an electronic visa application form, DS-160. This form will be actually filed electronically with the consular post, rather than the current version (DS-156 and others) that is bar-coded electronically, but still must be physically filed with the consular post.

The form is currently required at 12 posts (some Mexican and Canadian posts, Dublin, Hamilton, Hong Kong, and Tripoli) and will soon be required at others (other Mexican posts and Australia to start). Phase-in will likely be slow due to DOS server capacity.

### VWP Emergency or Temporary Passports must be Electronic

DOS also recently announced that visitors allowed to enter without visas through the "visa waiver" program must have an electronic passport even if the passport is an emergency or temporary one. An electronic passport is one that has an embedded computer chip that contains biometric information.

Travelers without an electronic passport may be subject to additional inspection or denied entry. Medical and other emergency situations will be considered.

Whew! That is a big update. Please contact us if we can be of assistance.

Lori Chesser, Chair, Immigration Department