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H-1B Quota for FY2010 Reached

The H-1B nonimmigrant visa category, which includes a total of 85,000 "slots" per government fiscal year, has reached its limit for FY2010 (October 1, 2009 to September 30, 2010). According to U.S. Citizenship and Immigration Services (USCIS),

As of December 21, 2009, USCIS had received sufficient petitions to reach the statutory cap for FY2010. USCIS has also received more than 20,000 H-1B petitions on behalf of persons exempt from the cap under the advanced degree exemption. USCIS will reject cap-subject petitions for new H-1B specialty occupation workers seeking an employment start date in FY2010 that are received after December 21, 2009. USCIS will apply a computer-generated random selection process to all petitions that are subject to the cap and were received on December 21, 2009.

Employers will next be eligible to file new (cap-subject) H-1B petitions on April 1, 2010, the first day that FY2011 H-1B cases may be submitted to USCIS. H-1B petitions filed for FY2011, if approved, would be effective October 1, 2011.

Changes to Prevailing Wage Requests Effective January 1, 2010

Starting January 1, 2010, employers will no longer file prevailing wage requests regarding H-1B, certain other nonimmigrant petitions, and PERM labor certification applications with the state workforce agency in which the job opportunity is located. The U.S. Department of Labor (DOL) requires that all prevailing wage requests made on or after January 1, 2010 be filed on ETA Form 9141 with the DOL by mail or courier delivery. An on-line filing option is expected to be operational in mid-January 2010.

Centralization of wage determinations should result in greater consistency and predictability in prevailing wage determinations than has been the case with more than 50 agencies making wage determinations at the state level.

Employers should recognize that centralized filing will empower DOL to better compare representations made by employers about jobs bearing the same title. Employers should, as always, ensure that job information they submit to DOL is accurate and consistent. If job requirements -- such as the educational degree and the number of years of experience -- are not consistent with previous prevailing wage requests for jobs bearing the same title, the employer should be certain to capture any distinguishing characteristics of this variation of the job which justify the different educational and experiential requirements.

Worldwide Deployment of the DS-160 Visa Application Form

In recent years, the U.S. Department of State ("DOS") has developed an electronic version of its Nonimmigrant Visa Application, known as the "DS-160." The DS-160 will replace the DS-156 nonimmigrant visa application form that DOS has used for many years. The DS-160 includes all information previously collected by the DS-156 and the supplemental DS-157 and DS-158 forms used by foreign nationals to apply for various U.S. visas. Because the DS-160 is entirely electronic (it is completed and stored on-line), the U.S. embassy or consulate where the visa application is made has the ability to review the visa application data before the visa applicant physically appears for an interview.

DOS is rolling out the DS-160 to another wave of U.S. consular posts by March 1, 2010, with all remaining posts required to implement the DS-160 form by April 30, 2010. Visa applicants must carefully check the U.S. embassy or consulate website at the outset of visa application preparation to determine if the consular post is now using the DS-160 or will use it by the time that the visa applicant will appear for a visa interview. Otherwise, the visa applicant might attend the interview only to learn that the DS-160 is required and the interview must be rescheduled.

One practical tip relating to the DS-160 relates to changes that the visa applicant might want to make to the form after it is submitted on-line. In the former DS-156 context, applicants did not experience problems where they completed a DS-156 on-line and then made corrections to the DS-156 prior to their visa interview. With the DS-160 form, it remains to be seen whether U.S. consulates will flag cases involving revised DS-160 applications and subject visa applicants to closer scrutiny because of changes to their DS-160s. It would be wise to consult with counsel about key questions on the DS-160 before submitting the application, at least until there is a greater understanding regarding how DOS views changed DS-160 data.

HIV Applicants No Longer Inadmissible and Requiring Waivers After January 4, 2010

Due to a change by the Centers for Disease Control (CDC) that takes effect on January 4, 2010, foreign nationals who are HIV-positive will no longer be deemed to have a communicable disease of public health significance, and U.S. immigration-related medical exams will no longer include HIV tests in their scope.

As a result, HIV-positive visa applicants will no longer need to answer "yes" to the question on nonimmigrant and immigrant visa application forms that asks "Have you ever been afflicted with a communicable disease of public health significance or a dangerous physical or mental disorder…?" and will not need to apply for a waiver of inadmissibility to secure a U.S. visa.

HIV-positive applicants should be aware that a U.S. consular officer may still deny a visa application on the ground that the applicant might be or become a public charge if the visa applicant cannot afford necessary treatments while in the U.S. This basis for visa refusal might apply where, for example, an applicant appears visibly ill, the issue comes up during the visa interview, the U.S. visit or assignment is of significant duration, and the applicant cannot prove that he or she has health insurance or adequate funds to cover related medical treatment that would be necessary in the U.S. So HIV-positive visa applicants should carry proof of medical insurance to present at the interview (but present it only if the issue arises).

New Law Benefits the Widows and Widowers of Deceased U.S. Citizens

Formerly, if a U.S. citizen died before he or she had been married to a foreign national for two years, the foreign national spouse would lose the right to qualify for permanent resident status through the deceased

U.S. citizen spouse. As of October 2009, eligible widows or widowers of U.S. citizens may now apply for permanent resident status (if they are otherwise eligible) regardless of how long the couple was married. A spousal petition filed by the deceased U.S. citizen will automatically be converted to the new widow(er) petition process. A foreign national spouse whose deceased U.S. citizen spouse had not filed a petition must file an application within two years of the date of the U.S. citizen's death. Unmarried minor children of the widow(er) may also qualify as derivative applicants for permanent residence under the new law.