Dinsmore & Shohl LLP
ATTORNEYS

Immigration Insights (April 2010)

April 30, 2010

Arizona Immigration Law Sparks Debate and Reminder to Foreign Nationals Inside and Outside Arizona

Arizona's Governor Jan Brewer signed a bill into law on April 23, 2010 that makes it a state crime to be in Arizona illegally and requires state police to check the status of people they suspect to be illegal immigrants. The law also requires immigrants to carry their registration documents with them at all times. The law is controversial and has sparked considerable debate over its constitutionality, whether it authorizes police to engage in racial profiling, whether it will overwhelm local law enforcement and could possibly damage local economies. Arizona is the only state with this type of law. The law, which already is being challenged in court, could spark renewed interest in comprehensive immigration reform with the current administration.

While debates continue to rage, the law should serve as a reminder to foreign nationals that they are required by *federal* law, not just in Arizona, to carry with them and have in their personal possession at all times evidence of their U.S. immigration status. While having these documents in one's possession at all times is inconvenient, the law does require all foreign nationals to carry with them "any certificate of alien registration." Failure to comply with the law is punishable as a misdemeanor and carries a fine of up to $100 or imprisonment of up to 30 days, or both.

USCIS Still Accepting H-1B Petitions for Fiscal Year 2011

April 1, 2010 marked the first day that employers were permitted to file H-1B (specialty occupation professionals) with U.S. Citizenship and Immigration Services ("USCIS") for Fiscal Year 2011. As of April 22, 2010, USCIS had received 16,025 petitions counted under the H-1B numerical limitation of 65,000 and had received an additional 6,739 petitions (of the 20,000 allowable) that are exempt from the cap because the beneficiaries hold a U.S. master's degree or higher.

The numerical limitation for the H-1B category for FY2010 was reached on December 21, 2009. There is no way to determine when the FY2011 will be reached. Employers are urged to file a petition as soon as possible if they are interested in obtaining an H-1B approval for a new hire or for existing employees who have limited work authorization, such as F-1 students with employment authorization cards or J-1 exchange visitors holding academic training work permission.

May 2010 Visa Bulletin - EB-3 India and China Advance Slightly; Mexico EB-3 Unavailable

The U.S. Department of State (DOS)'s May Visa Bulletin reflects movement in the permanent resident or "green card" Employment Third Preference (EB-3) categories for both India and China. The category moves

forward two months for China and one month for India. There is no movement in the Employment Second Preference Category for either India or China.

In contrast, the EB-3 Mexico category is now unavailable. The DOS states that "due to continued heavy applicant demand..., the annual limits for the Mexico Employment Third and Third Preference Other Worker categories have been reached....Visa numbers will become available once again in October with the start of the new fiscal year."

The Employment First Preference category remains current across the board.

Employers are Reminded Not To Specify Which Documents Should Be Presented For I-9 Purposes

On April 16, 2010, the Justice Department filed a complaint against John Jay College alleging that the college engaged in a pattern and practice of discrimination by requiring all non-U.S. citizens to present certain work authorization documents to the exclusion of other acceptable documents.

Federal law requires all U.S. employers to document that each employee hired after November 6, 1986 (including U.S. citizen employees) has proper employment authorization and that each employee's identity is consistent with the person's employment authorization documents. In order to comply, employers are required to complete an Employment Eligibility Verification Form I-9 and to require new hires to present either (i) a Form I-9 List A document to establish both employment eligibility and identity; or (ii) separate documents from Form I-9 Lists B and C to establish their employment eligibility and identity respectively.

The complaint filed by the Justice Department alleges that John Jay College imposed different or greater employment eligibility verification standards on non-citizens as compared to U.S. citizens and, in one instance, required that an employee who produced an unrestricted Social Security card and driver's license to also produce her permanent residence card. Federal law prohibits employers, both private and public, from imposing different or greater employment eligibility verification stands on non-citizens as compared to U.S. citizens.

All employers should remember that they may not specify which documents they prefer to see regarding the I-9 process, and as long as the documents presented enable the employer to complete the I-9 form, the employer must accept the documents if they meet the Form I-9 standards.

New Measures to Strengthen Aviation Security

The Department of Homeland Security (DHS) announced recently that the Transportation Security Administration will begin implementing new, enhanced security measures for all air carriers with international flights destined to the United States. The new measures utilize real-time, threat-based intelligence, and "[p]assengers traveling to the United States from international destinations may notice enhanced security and random screening measures throughout the passenger check-in and boarding process, including the use of explosives trace detection, advanced imaging technology, canine teams, or pat downs, among other security measures." Click here for more information.

U.S. Supreme Court Rules that the Sixth Amendment Right to Counsel Requires That Non-Citizen Defendants Receive Competent Immigration Advice Regarding Deportation Risks of a Guilty Plea

In March the U.S. Supreme Court reversed a ruling by the Kentucky Supreme Court in which the Kentucky court said that defendant Padilla was not entitled to protection from erroneous deportation advice. According to the Kentucky court, deportation is merely a collateral consequence of a criminal conviction.

In this case, defendant Padilla, a lawful permanent resident ("green card" holder) of the United States for over 40 years, faced deportation after pleading guilty to drug distribution charges. After his conviction, Padilla claimed that his lawyer not only failed to tell him that before he plead guilty that doing so would cause him to be deportable from the United States, but also told him not to worry about deportation because he had lived in this country for such a long time. Padilla contended that he would not have plead guilty but, instead, would have requested a full trial had he not received incorrect advice from his lawyer.

The U.S. Supreme Court decided that deportation is inherently part of the punishment meted out to non-citizen defendants and that constitutionally competent counsel would have advised Padilla of the consequences prior to his guilty plea. The Court said in its decision that.

It is our responsibility under the Constitution to ensure that no criminal defendant, whether a citizen or not, is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform the client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Padilla v. Kentucky, 559 U.S. _____(2010).