

ALERTS AND UPDATES

USCIS's Fee Increases and Other Immigration Law Updates

September 13, 2010

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USCIS Implements H-1B and L-1 Fee Increases for Certain Employers

On August 13, 2010, President Obama signed into law Public Law 111-230, for the U.S. Citizenship and Immigration Services (USCIS) to levy an additional filing fee for H and L petitions filed by employers who have 50 or more employees, and whose work force is composed of more than 50 percent of employees in H or L nonimmigrant status—including L-1A, L-1B and L-2. The law requires these employers to submit an additional \$2,000 fee for H-1B petitions and \$2,250 for L-1A and L-1B petitions filed and postmarked after August 14, 2010. This law will remain in effect through September 30, 2014. This fee is in addition to the standard processing fee (\$320), existing fraud prevention and detection fee (\$500) and applicable American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) fees (\$750/\$1,500).

The I-129 forms have not yet been updated to reflect the new law. Requests for Evidence (RFE) are already being sent by USCIS to all H-1B petitioners to verify whether the new law applies or not. As a way to potentially avoid an RFE, employers with more than 50 employees may want to include a statement with all H-1B and L-1 visa petitions, certifying whether or not the company is not subject to the new law. USCIS recommends that all H-1B, L-1A and L-1B petitioners, as part of the filing packet, include the new fee or a statement of other evidence outlining why this new fee does not apply. USCIS requests that petitioners include a notation of whether the fee is required in bold capital letters at the top of the cover letter.

Kentucky Consular Center Conducting Unannounced Telephonic Audits of Nonimmigrant Visa Petitioners and Employers

The U.S. Department of State's Kentucky Consular Center (KCC) is responsible for creating an electronic record of approved nonimmigrant visa petitions to allow tracking of nonimmigrant visa petitioner and petition information, which is accessed by consulates abroad in the adjudication of visa applications. The consulate must verify the approved petition through the KCC's system, known as "PIMS." The State Department recently instructed the KCC to begin auditing approved petitions at random, which can include unscheduled calls to the petitioner. Fifteen contractors have been hired to perform this task. During the call, the KCC contractor will ask the petitioner to verify certain details of the approved petition, including whether the petitioner in fact submitted the petition; when the petitioner was incorporated (if applicable); the petitioner's physical location, number of employees and names of shareholders; the location of the petitioner's attorney of record, and other general information regarding the petitioner's operations and business plan.

Employers may want to consider thoroughly reviewing the contents of all nonimmigrant visa petitions they file and notifying counsel if any errors are identified. It is important to note that the KCC usually conducts these audits shortly after the petition is approved, but is authorized to contact the petitioner after the visa has been issued abroad. Employers may wish to request the name of the contractor so that the credentials of the caller may be verified. As there are multiple agencies that may audit the relevant petition, it is vital to determine which agency is requesting the information.

FY 2011 H-1B Cap Count

As of September 3, 2010, USCIS has received and accepted for processing approximately 36,600 H-1B cap-subject petitions. Additionally, USCIS has received 13,400 H-1B petitions for aliens with advanced degrees. USCIS is still accepting H-1B petitions under both the general cap and the advanced degree cap.

A separate mailing address has been established for certain types of educational or nonprofit organizations which file H-1B petitions on behalf of beneficiaries that are not counted against the H-1B numerical limitations.

Noteworthy Service Transition for All U.S. Visa Applicants in Canada

As of September 1, 2010, the U.S. Mission in Canada will provide services for visa applicants, including scheduling an appointment or calling for information, at no charge. Applicants will no longer have to pay phone or PIN-code charges to access such services. In order to obtain visa information or to start the visa application process at a Canadian consulate on or after September 1, 2010, please visit <http://canada.usvisa-info.com/>. In addition, USCIS has created a general inquiry mailbox for USCIS customers in Canada. Canadian customers were previously unable to access the USCIS National Customer Service Center toll-free telephone line. Canadian customers may now email inquiries to USCIS.Canada@dhs.gov.

DHS, CBP Announce Interim Final Rule for ESTA Fee

Beginning on September 8, 2010, the U.S. Customs and Border Protection (CBP) implemented an interim final rule that amends Department of Homeland Security regulations to require travelers from Visa Waiver Program (VWP) countries to pay operational and travel promotion fees when applying for an Electronic System for Travel Authorization (ESTA). A fee of \$4 will recover the costs incurred by CBP of providing and administering the ESTA system and is in addition to the mandatory \$10 travel promotion fee established by the Travel Promotion Act of 2009. The total fee for a new or renewed

ESTA will be \$14. All payments for electronic travel authorization applications must be made by credit card or debit card when applying for or renewing an ESTA.

Change of Filing Location for Form I-140: Immigrant Visa Petition for Alien Worker

In a further effort to streamline the filing of petitions with lockbox facilities, USCIS has announced the release of a newly revised I-140 form and filing location for Forms I-140. Form I-140 filed alone or together with an Application to Register Permanent Residence or Adjust Status (Form I-485) should be filed at the USCIS Dallas Lockbox facility, or at the USCIS Nebraska or Texas Service Centers, depending on the classification for which the petition is being filed. Forms I-140 for skilled workers (marked "f" in Part 2, Petition Type, of the form) should continue to be submitted to either the Nebraska or to the Texas service centers. Forms I-140 that are accompanied by a Form I-907, Request for Premium Processing Service, should also be submitted only to the Nebraska or Texas service centers. Beginning on August 3, 2010, all other Form I-140s should be submitted to the USCIS Dallas Lockbox facility. Detailed guidance can be found in the updated Form I-140 instructions on the USCIS website at www.uscis.gov.

If a service center receives a Form I-140 that should have been submitted to the USCIS Dallas Lockbox facility, it will forward the form, and any other forms filed in the same envelope, to the Dallas lockbox facility for 45 days (until September 17, 2010). After September 17, 2010, petitions improperly filed at the USCIS Service Centers will be returned to the petitioner as improperly filed, with instructions to send the petition to the correct location. USCIS will issue a receipt upon receiving a properly filed Form I-140 in accordance with its revised filing instructions.

National Visa Center Launches Electronic Immigrant Visa Processing Pilot Program

The National Visa Center (NVC), a division of the U.S. Department of State that is responsible for administrative processing of approved immigrant visa petitions, has begun an electronic processing pilot program. The program uses electronic communications and documentation methods in an effort to streamline and simplify its processing of documents and forms submitted by visa applicants. The program will entail completing all necessary forms online and submitted civil documents in PDF format to the NVC. Original documents, including birth and marriage certificates, are then presented at the visa interview at the consulate abroad. The NVC is sending invitation letters to applicants who can elect to participate in the program. If the applicant does not wish to participate in the electronic program, the applicant may submit documents by mail.

The Department of State also recently announced that the paper forms used in NVC processing, the DS-230 and DS-231 forms, will soon be replaced by an electronic form, the DS-260. Similar to the DS-160 for nonimmigrant visa applications, the DS-260 will allow the visa applicant to complete and submit the form online. The completed application will then be transmitted to the NVC to complete processing, and will also be available to the consulate abroad where the immigrant visa interview will take place.

Department of Labor Publishes FAQs

On August 3, 2010, the U.S. Department of Labor Employment and Training Administration Office of Foreign Labor Certification issued "Frequently Asked Questions, Permanent Labor Certification, Round 11." The issues addressed include the following:

1. Expediting requests. The Office of Foreign Labor Certification, as a matter of policy, does not expedite the processing of applications due to the particular circumstances of any individual employer, foreign worker or family member.
2. Employee referral program as a form of recruitment. An employer can document its use of an employee referral program with incentives by providing dated copies of its notices or memoranda advertising the program and specifying the incentives offered as well as other appropriate documentation. In addition to establishing the existence of a referral program, employers must document that their employees were aware of the vacancy for which certification is being sought through means such as a posting on the employer's internal website.
3. Unsolicited documentation. Where an employer or its representative submits unsolicited documentation in conjunction with, or after filing an ETA Form 9089, the application will be automatically selected for audit, except in the case of a request for reconsideration filed after an application is denied.
4. What does the U.S. Department of Labor count as a business day? The Office of Foreign Labor Certification has interpreted business days to mean Monday through Friday, except for federal holidays.

New Guidance Issued Promoting Expedited Adjudication of Petitions Filed on Behalf of Foreign Nationals in Removal Proceedings

On August 20, 2010, U.S. Immigration and Customs and Enforcement (ICE) established a new policy requiring that petitions filed on behalf of foreign nationals in removal proceedings be expedited by USCIS. The new mandate was issued in an effort to potentially decrease delays and eliminate the growing backlog of cases before the immigration courts. The policy memo confirms that ICE will work with USCIS to establish a framework for expediting meritorious petitions where USCIS has jurisdiction.

The new policy also directs ICE attorneys at the local level to review all pending removal proceedings where the foreign national is immediately eligible for an immigration benefit, and make a determination on whether those proceedings can be terminated. Factors to be considered include the foreign national's criminal record, immigration history, and ties to the United States. Terminating proceedings in these cases would allow the foreign nationals to have their applications decided by USCIS and may help to clear additional cases from the immigration courts' overburdened dockets.

Some have appeared to misunderstand the policy announcement, referring to it as "back-door amnesty." The policy does not grant legal status to those who would not otherwise be eligible. Instead, it allows clearly approvable cases to be moved to the agency for adjudication, and clears the immigration courts' dockets for cases where removal proceedings are more appropriate.

***U.S. v. State of Arizona* Litigation Continues**

The U.S. Department of Justice's lawsuit against the State of Arizona for its enactment of the controversial state law "SB 1070" continues with briefs due in the next several weeks. However, the most-debated portions of the law were enjoined from going into effect on July 29, 2010, when Judge Bolton of the U.S. District Court in Arizona granted the federal government's motion for a preliminary injunction. The judge held that certain sections of the law were likely to be found unconstitutional and subject to preemption by federal law, and that the interests of the United States would likely suffer "irreparable harm" if the injunction were not granted. Specifically, Judge Bolton's decision stopped the enforcement of the provisions of SB 1070 that:

- Require a law-enforcement officer to make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and to verify the person's immigration status prior to release;
- Criminalize the failure to apply for or carry alien registration papers;
- Make it a crime for an undocumented alien to solicit, apply for or perform work in Arizona;
- Authorize the warrantless arrest of a person where there is probable cause to believe that the individual has committed a crime or offense that makes him or her removable from the United States.

Duane Morris will continue to monitor the progress of the lawsuit and report on any new developments as they arise.

Special Instructions for B-1/B-2 Visitors Wishing to Enroll in School

The USCIS recently issued a memo confirming that the regulations governing B-1/B-2 (visitor) status prohibit study in the United States while an individual is in the country in a visitor status. The USCIS reminds such visitors who wish to enroll in school to first acquire F-1 (academic student) or M-1 (vocational student) status. A visitor in valid B-1/B-2 status may request a change of status to F-1 or M-1, provided that the individual's status has not expired and the individual has not yet enrolled in classes and has not engaged in unauthorized employment. If an applicant has already enrolled in classes, or has otherwise violated his or her status, he or she must return to the home country and apply for an F-1 or M-1 student visa at the appropriate consulate.

About Duane Morris

Duane Morris has been named "[Immigration Law Firm of the Year](#)" by *Finance Monthly* magazine in the publication's Law Awards for 2010 edition.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.