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The Pool is Still Open - Employers May Continue to file H-1B Work Visa Petitions

U.S. Citizenship and Immigration Services (USCIS) released the latest numbers relating to the volume of H-1B specialty occupation professional visa petitions that it has received requesting approvals during the H-1B Fiscal Year (FY) 2011 cap season. Petitions must request a starting employment date of October 1, 2010 or later. As of June 25, 2011, USCIS had received 23,500 cap eligible petitions filed under the regular annual limit of 65,000, and 10,000 petitions filed under the U.S. graduate degree exemption which has 20,000 available spots. Employers commonly use the H-1B category to hire professionals who have unique skill sets or education in hard to find niches including but not limited to sectors of the scientific, engineering, computer science, finance or marketing fields. H-1B extension petitions are not subject to the H-1B cap, and some employers, such as colleges and universities, are exempt from the H-1B annual limits.

Lawsuit Filed Against USCIS' Restrictive Re-interpretation of "Employer/Employee" Relationship

In January 2010, U.S. Citizenship and Immigration Services (USCIS) unveiled a lengthy memorandum that re-defined the employer-employee relationship in immigration cases, such as H-1B work visa requests. The clear intent of the memo was to re-interpret the law to make it almost impossible for employers to place H-1B and other foreign workers at any third-party worksites. Following release of USCIS' memo, employers filing immigration cases began receiving challenges and denials based on USCIS' new interpretation of the law.

The recently filed lawsuit charges that the USCIS memorandum is, actually, a "federal rule" or regulation and that USCIS has violated mandatory rulemaking procedures under the Administrative Procedure Act (APA). USCIS' trend of issuing memoranda – rather than following the public procedure to promulgate regulations – has grown over the years. For example, USCIS' decisions on H-1B and permanent residence "portability," a new concept created by the American Competitiveness in the 21st Century Act (AC21), are guided by USCIS memoranda even though Congress passed the AC21 law almost 10 years ago. USCIS has not bothered to propose any implementing regulations regarding these important areas of law.

Issuing agency memoranda rather than proposing regulations self-empowers USCIS to change its own "rules" without considering public comment or abiding by the law that requires assessment of the impact of regulation on small businesses. Basically, USCIS makes its own rules without public input, as required by the APA, and changes the rules, often retroactively, whenever it suits USCIS' agenda to make changes.

In the lawsuit, *Broadgate et al. v. USCIS et al.*, filed June 8, 2010, three software developers and IT services firms and two non-profit trade associations contend that USCIS issued its memorandum in violation of the Administrative Procedure Act's notice and comment requirements; USCIS failed to perform a Regulatory Flexibility Act analysis; the memorandum is inconsistent with existing rules regarding the employee-employer relationship and the definition of "contractor" and conflicts with the plain language of

the law; and it is arbitrary and capricious. The plaintiffs have asked the court to enjoin USCIS from implementing the memorandum. The lawsuit is pending in the U.S. district court in Washington, DC.

USCIS Proposes to Raise Filing Fees for Immigration Benefits

USCIS is seeking to raise immigration filing fees to close a projected $200 million budget deficit for the 2010-2011 fiscal year. This comes only three years after USCIS raised filing fees an average of 66%. The new proposal would raise fees an average of 10%. USCIS highlights in its proposal that it will not raise fees in a few areas such as naturalization applications, but in many core petition types such as I-129 work visa petitions, there will be increases. The American Immigration Lawyers Association (AILA) wants USCIS to tie any rate increases to improvements in adjudication times and in better quality of case adjudication.

Uncertainty Looms on How USCIS Will Implement Kazarian v. USCIS Decision

In a recent federal court case, *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. March 4, 2010), the U.S. court of appeals upheld USCIS' denial of an EB-1 Extraordinary Ability Immigrant Petition but found that USCIS had impermissibly redefined the categories of evidence listed in the federal regulations in a narrower fashion than the rules permitted, and improperly discounted evidence submitted by the petitioner. The *Kazarian* decision is of great interest to organizations and individuals who file Extraordinary Ability, Outstanding Researcher, and National Waiver Interest permanent resident cases because the court's analysis and conclusions in *Kazarian* support a contention made by immigration practitioners that USCIS has embarked on a mission to discount significant and valid evidence that their clients meet the evidentiary standards.

During a May 2010 meeting between the American Immigration Lawyers Association (AILA) and the USCIS Nebraska Service Center, AILA asked USCIS if it was in the process of changing its adjudicatory standards and training for Immigrant Petitions in the wake of the *Kazarian* decision. USCIS indicated that it had not modified adjudication standards based upon the decision, but was working with a group from another USCIS Service Center to draft a new style of Request for Evidence (RFE) as directed by USCIS Director Mayorkas. However, there is a concern that the two issues are not the same. The new style of RFE initiative is focused primarily on the due process concerns previously raised by AILA that USCIS fails to provide petitioners a clear understanding of where USCIS believes the evidence has not met the burden of proof. By contrast, the *Kazarian* decision focused on USCIS' practice of erroneously evaluating (and often discounting) the sufficiency of the evidence that the petitioner submitted.

Enforcement Focus Continues to be at the Forefront of U.S. Immigration Agencies' Agenda

Recent reports illustrate the focus of U.S. government agencies on continued immigration enforcement. In June 2010 meeting between the American Immigration Lawyers Association (AILA) and U.S. Citizenship and Immigration Services (USCIS)'s Fraud Detection and National Security (FDNS) unit, FDNS indicated that there are three types of site visits that are ongoing:

1. site visits resulting from part of a fraud inquiry;
2. site visits conducted as a result of a Benefit Fraud Compliance Assessment; and
3. site visits conducted as part of a Compliance Review.

FDNS revealed that it made 2028 site visits in fiscal year 2009, resulting in 229 notices of intent to revoke approved petitions; and 14,324 site visits in fiscal year 2010, resulting in 496 notices of intent to revoke. Employers should note that if they have not already done so, they should review our memorandum about what to do in the event of a USCIS site visit regarding an H-1B, L-1 or Immigrant Petition, including making sure those staff who might encounter the USCIS representative know what to do. Please see our memorandum.

Further, according to recent figures released by the U.S. Department of Justice, the number of federal immigration prosecutions has jumped 30% month over month from February to March 2010, as Immigration Customs and Enforcement (ICE) continues to ramp up its activities and its cooperation with federal prosecutors.