Dinsmore&Shohl LLP
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Immigration Insights (May 2010)

May 28, 2010

Failure to Complete I-9 within 3 Days is "Substantive" Violation

A recent decision issued by the Department of Justice's Office of the Chief Administrative Hearing Office ("OCAHO"), found that an employer's failure to complete Section 2 of the I-9 (Employment Eligibility Verification) form within three business days was a "substantive" rather than technical/procedural violation. This is an significant change that could result in employers facing increased fines. In an audit, an employer has the opportunity to request 10 days to correct "technical/procedural" errors and avoid I-9 fines and penalties. An employer does not have the opportunity to correct "substantive" violations. Click here to read the OCAHO decision.

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H-1B FY11 Cap Case Update -- Slots are Still Available

As of May 21, 2010 approximately 19,600 H-1B cap-subject petitions and approximately 8,200 petitions qualifying for the U.S. earned advanced degree cap exemption had been filed for fiscal year 2011. The regular limit (for non advanced degree cases) is 65,000 H-1B approvals per year. USCIS will continue to accept both cap-subject petitions and advanced degree petitions until a sufficient number of H-1B petitions have been received to reach the annual limits, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn. USCIS updates the H-1B cap count about twice a month. In the two week period leading up to the May 21st update, USCIS received 600 new cap-subject H-1B cases and 100 advanced-degree petitions.

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PERM Labor Certification Processing Times Updated

The U.S. Department of Labor (DOL) updates its processing or adjudication times for PERM labor certification applications usually each month on its website. Employers and employees can check this website to gauge where DOL's processing stands in relation to PERM labor certification cases already filed. As of DOL's latest update on April 30, 2010, DOL was reviewing regular, unaudited labor certification applications that were filed in July 2009. The standard processing time for regular unaudited labor certifications remains steady at approximately 10 months, though some employers are experiencing decisions in less than 10 months. For audited cases, DOL is deciding cases that were submitted in April 2008, which remains unchanged since last month and which remains steady at approximately 25 months.

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I-94W Paper Form for Visa Waiver Program Travelers to be Eliminated

U.S. Customs and Border Protection (CBP) will eliminate the use of paper I-94W forms for Visa Waiver Program (VWP) [Kyle, would you hyperlink "Visa Waiver Program" to travelers with an approved Electronic System for Travel Authorization (ESTA) arriving in the United States at all airports by the end of this summer. CBP will activate automated processing for U.S. airports on a rolling basis over the next several months. This announcement comes after a successful seven-month pilot program conducted with the support of the Government of New Zealand on Air New Zealand flights from Auckland to Los Angeles International Airport. For additional information, please view the CBP announcement.

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Department of State Increases Fees for Visa/Consular Services Effective June 4

The Department of State (DOS) has increased several fees for consular services effective June 4, 2010. Of significance are the new, variable fees for nonimmigrant visa applicants who complete the universal Form DS-160 (Nonimmigrant Visa Application).

- For H, L, O, P, Q and R nonimmigrants, the visa application fee will increase (from $131) to $150.
- For E-1, E-2 and E-3 nonimmigrants, the new visa application fee will be $390.

NOTE: These new fees apply both to the principal visa applicant and to each dependent family member because DOS has made no distinction between the visa fees for principal applicants and those for derivative family members. In other words, an E-2 treaty investor or employee with an accompanying spouse and two children will now pay $1,560 in visa application fees! For a full list of the new fees, please click here.

In the interim regulation that DOS published, DOS made two interesting admissions:

1. The new, web-based, all-electronic DS-160 nonimmigrant visa application has thus far not resulted in any significant time savings for U.S. consular staff.
2. The increased visa application fees may case some countries to increase visa fees charged to U.S. visa applicants.

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June 2010 Visa Bulletin -- EB-2 and EB-3 Categories Advance

The U.S. State Department (DOS)'s June Visa Bulletin reflects some movement in the permanent resident or "green card" Employment Second Preference (EB-2) and Third Preference (EB-3) categories. The EB-2 "all chargeability" category remains current, the cutoff date for EB-2 India remains unchanged at February 1, 2005, the cutoff date for EB-2 China advances two months to November 22, 2005. The EB-3 all-chargeability and China categories advance two months to June 22, 2003, and the cutoff date for EB-3 India advances three weeks to October 22, 2001. The Employment First Preference category remains current across-the-board.

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USCIS Presents Validation Instrument for Business Enterprise (VIBE)

This week, U.S. Citizenship and Immigration Services (USCIS) invited stakeholders to participate in a session about the Validation Instrument for Business Enterprise (VIBE), a web-based tool to be used in adjudicating employment-based immigrant and nonimmigrant petitions. VIBE is essentially a live database containing information on businesses, that USCIS adjudicators will consult to determine whether the petitioner (employer) in an employment-based petition is legitimate and viable.

The data in VIBE is supplied by Dunn and Bradstreet (D&B) a leading information provider of commercial information and insight on businesses. D&B may be most known for having created the D-U-N-S Number assigned to hundreds of thousands of businesses worldwide. Among the information that D&B may provide to USCIS will be:

- validation of data consistency between branch & headquarter names
- reasonability between number of employees, sales volume and line of business
- validation of out-of-business status changes
- standardized addresses.

Stakeholders expressed concern that USCIS will rely on VIBE as the sole authority for information about the petitioner which will result in more USCIS challenges to petitioners to justify why the information that the petitioners supplied to USCIS with their cases and the information in VIBE do not match.

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USCIS' Employment Authorization Document Revised

U.S. Citizenship and Immigration Services (USCIS) has revised its Employment Authorization Document (EAD), or Form I-766, to incorporate the addition of a machine-readable zone on the back of the card. The new EAD card's machine-readable zone is compliant with International Civil Aviation Organization standards. USCIS has removed the two-dimensional bar code on the backside of the card and moved the informational box of text to just beneath the magnetic stripe on the card . The revised card retains all of its existing security features. To read USCIS' media release, please click here.

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USCIS' Permanent Resident Card is Again Green

U.S. Citizenship and Immigration Services (USCIS) has begun issuing a redesigned Permanent Resident Card - commonly known as the "Green Card" - to incorporate several major new security features. The redesign resulted from extensive collaboration with the Department of Homeland Security (DHS) Screening Coordination Office, the Immigration and Customs Enforcement (ICE) Forensic Document Laboratory, and U.S. Customs and Border Protection (CBP). Among the new car's features are:

- USCIS' number is now listed on the front of the card. The alien registration number is listed on the back of the redesigned Green Card (i.e., A# 000-000-000)
- Special ink creates color shifts in visual designs (e.g., eagle's head)
- Fine-lined artwork and complex architecture incorporate patterns that are nearly impossible to reproduce
- Standard card design and personalized features are integrated to deter fraud attempts, e.g., alteration of the photograph
- Greater detail in photograph makes for easier identification of the bearer

- Ultra-violet technology and tactile clues allow accurate card authentication at border crossings
- Radio Frequency Identification (RFID) allows government inspectors to read unique, 192-bit serial number (192-bits) from a distance and link the information to the personal data on file
- Personalized return address on back of card doubles as security feature and as customer-service enhancement to facilitate easy return of lost cards to USCIS
- In keeping with its nickname, the redesigned Permanent Resident Card is again green.

For more information and to see the new card, please click here.