Immigration Alert

January 2009

Review of Recent Significant U.S. Immigration Law Changes

The year 2008 and early 2009 have brought several important changes in U.S. Immigration law. The following are some of the more significant changes related to employment and admission that have been or will be implemented by the Department of Homeland Security.

Employment Authorization Document (EAD) – Up to Two-Year Validity

The USCIS began issuing a two-year validity Employment Authorization Document (EAD) to certain beneficiaries with pending Form I-485 Applications to Adjust Status to Permanent Residence. To be eligible for a two-year EAD, an applicant must have a pending Form I-485 that cannot be adjudicated because an immigrant visa number is not currently available under the relevant preference category. The applicant must also be the beneficiary of an approved I-140 Immigrant Petition for Alien Worker.

An applicant for an immigrant visa (or "Green Card") establishes his/her place in the visa line (called "priority date") either on the date that a PERM labor certification is filed on his/her behalf, or in cases where job sponsorship is not required, on the date that an immigrant petition (Form I-140, Immigrant Petition for Alien Worker or Form I-130, Petition for Alien Relative) is filed. Visa availability is published in a monthly notice produced by the State Department, called the "Visa Bulletin."

The USCIS will make its determination whether to issue a one-year or two-year EAD based on the most current Visa Bulletin released by the State Department. Applicants whose priority dates fall before the date published in the Visa Bulletin in the relevant preference category will continue to receive one-year EADs while their Adjustment of Status applications are adjudicated.

Applicants who request a replacement for a lost, stolen or damaged EAD that is unexpired will receive a replacement EAD valid until the expiration date of the original card. Only new requests or renewals will be eligible for the 2-year validity based on the current Visa Bulletin.

TN Professionals – Eligible for Three-Year Validity

The USCIS began allowing qualified Canadian and Mexican citizens entering under the TN "Professional" category of the North American Free Trade Agreement (NAFTA) to seek a three-year multiple entry status authorizing their temporary employment in the U.S. with a U.S. employer. Prior to the implementation, sponsoring employers and qualified TN applicants were only able to seek temporary admission for a maximum of one year, and then renew the authorization either by applying at the border, at an international airport's pre-flight admissions station, or by application to a Regional Service Center of the USCIS.

To be eligible for TN status the applicant must be a citizen of Canada or Mexico and be seeking entry on a temporary basis as a business person to engage in professional business activities at a professional level in the United States. Unlike the H-1B "Specialty Occupation" nonimmigrant visa category, the TN "Professional" category is not subject to annual quotas, and a TN applicant can theoretically extended such status indefinitely provided the applicant can show adequate ties to his/her home country. The cost of sponsoring a TN worker is also significantly less than that associated with H-1B sponsorship, where filing fees alone can run as much as $2,320 under regular processing (avg. 2-6 months) and $3,320 with expedited processing (within 15 days).

Optional Practical Training (OPT) – Up to 29 Months for STEM Graduates

With the H-1B numerical quota fixed at its initial 1990 level of 65,000 visas annually, U.S. employers and foreign nationals – particularly foreign students graduating from U.S. universities - have been paying the price for Congress' and the USCIS's lack of ameliorative action. Foreign students graduating from U.S. universities are typically allowed to apply for and receive up to 12 months of post-completion Optional Practical Training (OPT) to gain experience in their field. To receive valid authorization to work, the graduat-

ing student must apply to the USCIS for an Employment Authorization Document (EAD). To remain employed thereafter foreign graduates with OPT would need to obtain sponsorship under another work authorized visa category, typically H-1B. With serial shortages in H-1B visa availability, many foreign student with OPT have not been able to transition to H-1B status and continue their employment with their U.S. employers. To address this problem, in November 2004 Congress provided for the allocation of an additional 20,000 H-1B visas per year to be made available to students who earned a master's or higher degree "from a U.S. institution of higher education." While the additional 20,000 visas have been helpful, it has not solved the problem and in each year following its enactment the H-1B quota continues to be used up before the start of the fiscal year.

In April 2008, the U.S. Department of Homeland Security ("DHS") issued an interim final regulation making several important changes to the rules regarding Optional Practical Training for foreign nationals attending United States colleges and universities in F-1 foreign student status. The most important change was to allow a special one-time 17 month extension of OPT. The new rule only applies to F-1 foreign students who have completed a degree in a Science, Technology, Engineering or Mathematics ("STEM") designated field. The requirements for this special extension of status and employment authorization are as follows:

- The foreign student must currently be participating in a period of approved post-completion OPT.
- The foreign student must have a job offer from or be working with a U.S. employer in a job directly related to the foreign student's major area of study.
- The foreign student must have completed a degree (bachelor's, master's or PhD) from a U.S. academic institution in a degree program that is listed on the STEM Designated Degree Program List maintained by the U.S. Immigration and Customs Enforcement division of the USDHS (see www.ice.gov/sevis).
- The foreign student's employer must be registered as a participant in the E-Verify program that is operated by the USCIS (see www.uscis.gov/E-Verify).
- The employer must agree to report the employment termination of the foreign student to the Designated School Official (DSO) at the foreign student's college or university within 48 hours of any termination. A foreign student who fails to report for work for five consecutive business days without the consent of the employer is deemed to have terminated employment.

The benefit of this provision is immense. The extension essentially provides eligible F-1 foreign students and their U.S. employers with two opportunities to obtain an H-1B visa through the lottery process in two consecutive years. Further, in enacting the provision, the DHS through the USCIS will allow the F-1 student to continue to be employed while the 17 month STEM OPT application is pending (even if the EAD validity period authorizing the original OPT has expired).

Premium Processing of I-140 Petitions for H-1B Workers Nearing End of H-1B Status Limit.

The USCIS instituted a procedure whereby individuals in H-1B status with pending I-140 Immigrant Petitions can seek premium processing of the pending I-140 petition to avert running out of H-1B status. Normally, an H-1B worker may only be employed in H-1B status for a maximum of six years and must thereafter reside outside the U.S. for a full year before gaining eligibility to seek H-1B status for a new period of up six years.

In 2000, Congress enacted and President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC21) which provided relief for certain H-1B workers who were in the process of seeking to immigrate based on an offer of employment – either through the labor certification sponsorship and/or an immigrant petition (Form I-140 filing).

To qualify for an extension of H-1B status beyond the 6th year the sponsored worker has to have a labor certification or I-140 petition that had been filed on his/her behalf more than 365 days ago (the "365 Day Rule") OR have an approved I-140 petition but not be able to file or be approved for adjustment of status because of unavailability of an immigrant visa number (the "I-140 Rule").

H-1B workers can seek an extension of status beyond the 6th year in one year increments if they fall under the "365 Day Rule." If they fall under the "I-140 Rule," then the H-1B worker can seek an extension beyond the 6th year in three-year increments. The one party that AC21 did not protect was the H-1B worker nearing the end of the 6th year of H-1B who has an I-140 petition pending but had not had a labor certification filed on his/her behalf more than a year ago. Recognizing the severe prejudice an H-1B worker in this situation faced due to delayed I-140 processing times, the USCIS instituted an expedite program for processing their Form I-140 filing. To qualify, the applicant must:

- be in H-1B nonimmigrant status;
- be within 60 days of reaching the end of their 6th year of H-1B nonimmigrant stay; and
- be eligible only for an H-1B extension under the "I-140 Rule."

If these requirements are met, the USCIS will adjudicate the I-140 petition within 15 days of the expedite request filing.

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New Countries Added to Visa Waiver Program

Eight new countries have been added to the Visa Waiver Program. The Visa Waiver Program ("VWP") allows citizens of certain countries[1] to travel to the United States for tourism and certain business purposes for up to 90 days without first obtaining a United States visa. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, the Republic of Korea and the Slovak Republic are now among the 34 countries that are included in this program.

New Electronic System for Travel Authorization (ESTA) Program for Visa Waiver Entrants

Effective as of January 12, 2009, VWP participants are required, prior to traveling to the United States, to apply for authorization through the Electronic System for Travel Authorization ("ESTA"). A foreign national seeking to enter the United States under VWP must be a citizen of a country that is approved for participation in the VWP and must document that he/she has:

- Received authorization under ESTA (see discussion below).
- A Machine-readable passport valid for 6 months beyond the intended date of stay in the U.S.
- An acceptable purpose for traveling to the United States for business or tourism for 90 days or less.
- A return ticket to any foreign destination.
- The funds sufficient to support their expected stay in the United States.

ESTA authorization is obtained online (see https://esta.cbp.dhs.gov) and requires no fee. ESTA is available in 16 languages at present. Accompanied and unaccompanied children, regardless of age, must obtain individual ESTA authorization. In most cases, ESTA approval is immediate once the information is submitted electronically.

Employment Eligibility Verification (Form I-9) Revised

On or after February 2, 2009, employers must use the new version of Form I-9 (dated "Rev. 02/02/09") for all new hires. There are significant changes to the rules governing acceptable documents for completion of the Form I-9 Employment Eligibility Verification. By law an employer must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work in the U.S.. The Form I-9 is divided in three sections: (1) List A - documents that confirm both identity and employment authorization; (2) List B - documents that confirm identity only; and (3) List C - documents that confirm employment authorization only. The following are the major changes:

- Expired documents are not acceptable;
- Forms I-688, I-688A, and I-688B (Temporary Resident Card and older versions of the Employment Authorization Document) are no longer acceptable as List A documents to establish identity and employment authorization;
- A Social Security Card which "specifies on the face that the issuance of the card does not authorize employment in the United States" is not an acceptable List C document establishing employment authorization; and
- Added to the List A documents to establish identity and employment authorization are the following:
    - » U.S. Passport Card,
    - » Foreign passports containing specially marked machine readable visas bearing a temporary I-551 (Green Card) stamp, and
    - » Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) passports if provided with an I-94 of I-94 showing nonimmigrant admission under the Compacts of Free Association.

[1] Countries covered under the Visa Waiver Program include: Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. The United Kingdom refers only to British citizens with the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries are not included. Sec 8 CFR Sec 217.2 (a)

The Morse, Barnes-Brown & Pendleton, PC, **Immigration Practice Group** provides sophisticated legal services and practical advice to businesses of all sizes, ranging from technology start-ups to Fortune 500s.

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