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Immigration Law Update

Current Developments in Employment-Based Immigration
By Rosner Partners, L.L.C.

July 2009

- **H-1B Numbers still available for FY2010**
- **New I-9 Audit Initiative**
- **Premium Processing Service resumes for limited I-140 filings**
- **iCERT Visa Portal System now in effect for LCA filings**
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This is the latest installment in our efforts to keep you apprised of the rapidly changing U.S. immigration environment. Some of the most recent changes could have a serious impact on you or your employees, and we urge you to communicate these changes to interested parties.

H-1B Cap Update

On July 10, 2009, the following update appeared on the U.S. Citizenship and Immigration Services (USCIS) website:

As of July 10, 2009, approximately 44,900 H-1B cap-subject petitions and approximately 20,000 petitions qualifying for the advanced degree cap exemption had been filed. 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to reach the statutory limits, taking into account the fact that some of these petitions may be denied, revoked, or withdrawn.

Cap-subject H-1B petitions will be approved with a start date of October 1, 2009 (the start of the new fiscal year). If your company has a prospective hire who qualifies for H-1B status, we urge you to contact our office as soon as possible to initiate an H-1B petition while numbers are still available. Please contact our office at (216) 771-5588 or immigration@rosnerlaw.com if you wish to speak with someone regarding an H-1B petition for a new employee.

ICE Launches Nationwide I-9 Audit Initiative

On July 1, 2009, Immigration and Customs Enforcement (ICE) announced that it would be issuing Notices of Inspection to 652 businesses nationwide in a new initiative to step up I-9 audits. The notices alert business owners that ICE will be inspecting their hiring records to determine whether they are complying with current laws and regulations regarding employment eligibility verification.

Employers are required to complete Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. The Handbook for Employers, Instructions for Completing the Form I-9 (M-274) is available on the USCIS website, at http://www.uscis.gov/files/nativedocuments/m-274_3apr09.pdf.

In anticipation of ongoing government scrutiny of business immigration records, employers should be diligent in

ensuring of that all employee I-9 records are properly completed and up to date. Krispy Kreme Doughnut Corporation was recently fined \$40,000 after ICE conducted an I-9 audit, revealing that the company was in violation of immigration laws at its **Cincinnati, Ohio** factory.

Please feel free to contact our office for additional information regarding I-9 requirements.

Premium Processing Resumes for Certain Immigrant Petitions on Form I-140

Effective June 29, 2009, USCIS will now offer Premium Processing Service for Form I-140 Immigrant Petitions for the following categories: EB-1 Aliens of Extraordinary Ability; EB-1 Outstanding Professors and Researchers, EB-2, Members of Professions with Advanced Degrees or Exceptional Ability **not seeking a National Interest Waiver**, EB-3 Professionals, EB-3 Skilled Workers, and EB-3 Workers other than Skilled Workers and Professionals.

Premium Processing Service currently remains **unavailable** for EB-1 Multinational Executives and Managers, and EB-2 Members of Professions with Advanced Degrees or Exceptional Ability seeking a National Interest Waiver.

Under the Premium Processing Service, USCIS guarantees petitioners that, for a \$1,000 fee, it will process a case and issue a decision within 15 calendar days.

iCERT Visa Portal System Now Mandatory for Online LCA Submissions

The new iCERT Visa Portal System for Labor Condition Applications (LCAs), a preliminary step in the preparation of an H-1B petition, went into effect on July 1, 2009. Under the new system, LCAs no longer receive automatic certification. Instead, forms are submitted electronically to the Department of Labor via the iCERT portal where they must then await certification. Certified LCAs are then returned electronically via email, typically within 7 business days. Petitioners should keep in mind that this new LCA system will add at least an additional week to the preparation of H-1B petitions, and should therefore plan accordingly.

The iCERT Visa Portal System can be accessed at <http://icert.doleta.gov/>.

Department of State Advises on Visa Number Availability for the Remainder of FY2009

The Department of State Visa Office estimates that all 140,000 employment-based immigrant visa numbers will be used this fiscal year (October 1, 2008 to September 30, 2009). Based on USCIS processing during the first 7½ months of the fiscal year, the Department of State is now predicting visa availability for the remainder of FY2009. Of particular concern is the bleak prognosis for visa availability for nationals of India and those born in China. FY2009 has seen an ongoing demand for visas in the EB1 category and a surge in the usage of immigrant visa numbers for the EB4 and EB5 categories. The increase in the use of these preference numbers is significant because, historically, Indian nationals and Chinese born applicants have benefited from the excess visa numbers from other countries. The high demand from other countries this year means that there are fewer unused numbers to “fall across” or “fall down” to Chinese and Indian nationals in EB1 and EB2 categories, resulting in significantly longer waits to obtain green cards. An overview of the Department of State’s predictions for remaining visa availability for FY2009 is below:

Employment-Based Fourth and Fifth Preference (EB4 and EB5): These categories, which include religious workers and other special immigrants (EB4) and immigrant investors (EB5), have experienced a surge in the usage of immigrant visa numbers for FY2009. While these preference categories are current for August 2009, continued heavy demand for EB4 numbers could result in establishment of a cut-off date later in the fiscal year.

Employment-Based First Preference (EB1): Demand is high for the EB1 category worldwide, but it is anticipated that this category will remain current the remainder of the fiscal year. EB1 categories for India and China are current for the month of August 2009, but could require the establishment of a cut-off date later in the fiscal year should EB1 demand remain heavy.

Employment-Based Second Preference (EB2) for Indian nationals and Chinese born immigrants: As of August 2009, the cut-off date for both Indian nationals and those born in China is October 1, 2003. A significant number of EB2 India and China born EB2 cases have been reviewed by USCIS and queued up at the Department of State awaiting visa numbers for green cards. Like all other countries, China and India both have a limit of 2,800 EB2

numbers available per year plus any "across" and "down" numbers from EB4, EB5 and EB1 visa numbers. Without legislative relief, the prognosis for wait times is grim. With a drastic decrease in the number of excess visa numbers available to "across" or "down" to Indian EB2 applicants and Chinese born EB2 applicants, the waiting time for both groups may be measured in many years, and in some cases even decades.

Employment-Based Third Preference (EB3): EB3 worldwide will remain unavailable for the remainder of this fiscal year. The Department of State currently estimates that as of October 1, 2009 (the start of FY2010), the EB3 worldwide cut-off date will be March 1, 2003. Extended delays are anticipated in this category. EB3 visas for India, China and Mexico will be unavailable for the remainder of the FY2009. Based on the current demand for visa numbers, the Department of State estimates that, as of October 1, 2009, the following cut-off dates could be established: China will be March 1, 2003; India will be November 1, 2001; and Mexico will be March 1, 2003. Please note, however, that these estimates are based on processing from the first 7 ½ months of FY2009, and may change between now and early September when the October dates are established.

For additional information on current visa availability, please refer to the August 2009 Visa Bulletin, located at http://travel.state.gov/visa/frvi/bulletin/bulletin_4539.html.

REMINDER: Electronic System for Travel Authorization (ESTA) Requirements Now in Effect

Effective January 12, 2009, all foreign nationals traveling to the United States under the Visa Waiver Program (VWP) are now required to obtain advanced travel authorization through an online pre-approval system called the Electronic System for Travel Authorization (ESTA). ESTA approval will allow a traveler to board a carrier to the U.S. under the VWP, but will not guarantee admission to the U.S. Travelers entering the U.S. under the VWP will still be required to undergo inspection at U.S. ports of entry. The purpose of the ESTA is to proactively determine whether VWP travelers pose any law-enforcement or security risks. Submitted ESTA applications are reviewed against the appropriate law-enforcement databases. VWP Travelers must obtain ESTA authorization at least 72 hours before departing for the United States.

ESTA applications are to be submitted online at <https://esta.cbp.dhs.gov/>. VWP travelers will need to provide biographic and passport information, information about the upcoming travel (although specific details are not required), and information about the applicant's eligibility to use the VWP including previous arrests and convictions, communicable diseases, and previous visa denials. In most cases, once an application is submitted online, the ESTA website will provide an almost immediate determination of eligibility for travel under the VWP.

Once approved, an ESTA travel authorization remains valid for up to two years or until the VWP traveler's passport expires, whichever occurs first. An ESTA travel authorization will be valid for multiple entries into the United States during the period of validity.

Passport Requirements Now in Effect for Travel to the U.S. from Canada

As of June 1, 2009, all travelers entering the U.S. by land or sea must now present a valid passport or passport card when entering the U.S., *including return trips from Canada*. The new travel requirement is part of The Western Hemisphere Travel Initiative (WHTI), which was developed as a result of the Intelligence Reform and Terrorism Prevention Act of 2004. The initiative previously went into effect for air travelers on January 23, 2007.

Requirement to Use the E-Verify System Delayed Until 09/08/2009

Implementation of the final rule requiring federal contractors and subcontractors to begin using the E-Verify system has been delayed until September 8, 2009. The final rule exempts contracts that are for less than \$100,000 and those that are for commercially available off-the-shelf items.

The E-Verify program is an internet-based system operated by USCIS in partnership with the Social Security Administration (SSA). The E-Verify System allows participating employers to verify the employment eligibility of new hires by running online employment authorization checks against SSA and Department of Homeland Security (DHS) databases using employee Social Security Numbers and alien registration numbers. To participate in the E-Verify program, employers must register online at <https://www.vis-dhs.com/EmployerRegistration> and sign a memorandum of understanding (MOU), which outlines the terms of agreement between the employer, the SSA and USCIS.

Federal contractors participating in E-Verify for the first time are given 90 days from enrollment to begin using the system for new and existing employees. Federal contractors are given 30 days to initiate verification of existing employees who have not previously gone through the E-Verify system when they are newly assigned to a covered federal contract.

For additional information about any of the topics presented here, please [contact us](#).

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Rosner Partners, Counsel for Corporate Immigration

The Caxton Building • Suite 601 • 812 Huron Road • Cleveland, Ohio 44115 • [Map to our Offices](#)
Telephone: (216) 771-5588 • Facsimile: (216) 771-5894 • E-Mail: immigration@rosnerlaw.com

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