VEDDER PRICE

Immigration Law Alert

July 30, 2007

U.S. Citizenship and Immigration Services will Accept Adjustment of Status Applications

On July 17, 2007, U.S. Citizenship and Immigration Services (USCIS) announced that it had reversed its July 2 announcement that the fiscal year 2007 employment based visa numbers had been exhausted. Instead, USCIS will accept most employment-based adjustment of status applications (Form I-485) for a 31-day period, *through Friday, August 17, 2007*. Employment-based adjustment of status applicants in all but the "other worker" subcategory will be eligible to file cases during this period. In conjunction with this announcement, the Department of State (DOS) has reinstated the earlier July Visa Bulletin showing all employment based categories as current. We strongly recommend that employers ensure that all adjustment of status applications are filed prior to August 17, 2007, if possible, as employment-based visa numbers will retrogress again.

Major Changes in Labor Certification Rules

Time to Review Your Payback Agreements: Employers Must Absorb Costs for PERM Applications/ End of Labor Certification Substitutions

The U.S. Department of Labor (DOL) published a final rule, effective July 16, 2007, to "enhance program integrity and reduce the incentives and opportunities for fraud and abuse related to the permanent employment of aliens in the United States." The provisions apply to permanent labor certification applications and approved certifications filed under both the Program Electronic Review Management (PERM) program regulation and previous regulations implementing the permanent labor certification program. The DOL concluded that the benefits of the new provisions to the labor market and the prevention of fraud outweigh the concerns of individual employers. As such, the DOL has implemented a requirement that employers pay for the costs of the labor certification program, including the preparation and filing of the labor certification application. The beneficiary may pay attorneys' fees for representation of the beneficiary or other "legitimate" costs incurred by him or her only in circumstances where the attorney does not carry dual representation. An employer's transfer to the beneficiary of the employer's costs incurred is strictly prohibited. The DOL regulations provide debarment of an employer, attorney or agent for up to three years, based on certain enumerated actions such as fraud, willful provision of false statements, or a pattern or practice of noncompliance with PERM requirements, regardless of whether the labor certification application involved was filed under the previous or current regulation. The debarred party has the right to a review by the Board of Alien Labor Certification Appeals.

In addition, the final rule prohibits the substitution of beneficiaries for all pending permanent labor certification applications and approved permanent labor certifications with exceptions being made for DOL and USCIS requests made before the effective date, as well as substitution requests already in progress. The DOL rule institutes a 180-day validity period for approved labor certifications in which an employer must file an approved permanent labor certification in support of an I-140 immigrant petition within the allotted time frame. Finally, the new DOL rule prohibits modification of permanent labor

certification applications once such applications are filed with the DOL.

U.S. Citizenship and Immigration Services Increases Immigration Fees

USCIS has issued a final rule, effective July 30, 2007, that drastically increases fees for many immigration benefits. Selected specific increases include:

- Petition for a Nonimmigrant Worker (Form I-129): Fee increased from $190 to $320
- Application for Travel Document (Form I-131): Fee increased from $170 to $305
- Immigrant Petition for Alien Worker (Form I-140): Fee increased from $195 to $475
- Application to Register Permanent Residence or Adjust Status (Form I-485): Fee increased from $325 to $930
- Immigrant Petition by Alien Entrepreneur (Form I-526): Fee increased from $480 to $1,435
- Application to Extend/Change Nonimmigrant Status (Form I-539): Fee increased from $200 to $300
- Application for Waiver of the Foreign Residence Requirement (Form I-612): Fee increased from $265 to $545
- Application for Employment Authorization (Form I-765): Fee increased from $180 to $340
- Application for Naturalization (Form N-400): Fee increased from $330 to $595

USCIS will exempt adjustment of status (Form I-485) applicants who submit their cases prior to August 17, 2007 from this forthcoming July 30 filing fee increase.

Department of Homeland Security Revamping Electronic Verification System

The DHS is updating its electronic records system to consolidate information from different systems of records notices and to add new sources of data. The update includes Basic Pilot Program information used to determine whether a newly hired employee is authorized to work in the U.S. These enhancements are intended to significantly improve the speed at which USCIS may verify employment eligibility, and reduce the likelihood of fraud through forged documents.

The DHS also is creating a new Biometric Storage System which will replace the existing Legacy Systems, the Image Storage and Retrieval System (ISRS) and portions of the Biometric Benefit Support System (BBSS). This update is intended to further USCIS' goals of reducing case backlogs and improving the process of obtaining immigrant benefits.

Department of Homeland Security Issues Final Rule on Petitioning Requirements for O and P Nonimmigrants

On May 16, 2007, the DHS issued its final rule permitting petitioners to file O and P nonimmigrant petitions up to one year before the petitioner's need for the worker's services. By allowing petitioners to file Forms I-129 for O or P nonimmigrant status more than six months in advance of the need for the worker's services, USCIS is now able to ensure that the adjudication is completed well before the date of the scheduled event, competition, or performance, as a large percentage of O and P petitioners seeking performers or athletes must often plan for and schedule competitions, events, or performances more than one year in advance. The final rule does not apply the one-year filing time frame to other nonimmigrant classifications associated with Form I-129.

Department of Labor Holds H-2B Briefings, Releases Filing Tips

The DOL also has released updated guidance for State Workforce Agencies and ETA National Processing Centers (NPCs) when processing H-2B labor condition applications in nonagricultural occupations. The DOL said that the guidance is intended to work in concert with the new centralized filing process at the NPCs to ensure greater consistency in the processing of H-2B applications. Special handling procedures for certain nonagricultural occupations, such as forestry workers and boilermakers, will be issued through separate guidance letters by the National Office of Foreign Labor Certification.

Several More States Enact Employment Verification Laws

Employers in Arizona, Arkansas, Colorado, Georgia, Iowa, Massachusetts, Oklahoma, Tennessee, and Texas must now comply with state-specific employment authorization verification requirements. Generally, these states require state agencies and state contractors to complete additional steps to verify their employees' employment eligibility through the use of the DHS Basic Pilot Program and/or attestations. Only Arizona and Colorado extend such requirements to all employers in Colorado. Summaries of the requirements in each of the eight states are provided below.

Arizona—Effective January 1, 2008, Arizona prohibits employers who *knowingly* employ unauthorized workers and subjects violators to a three-year probationary period as well as possible suspension of their business license for a minimum of five days. Employers who *intentionally* employ unauthorized workers will be subject to a five-year probationary period and will have their business licenses suspended for a minimum of ten days. Subsequent violations during the probationary period will lead to a permanent revocation of an employer's Arizona business license. In addition, employers in Arizona must verify the work authorization of all new hires by utilizing the Basic Pilot Program.

Arkansas—Effective August 1, 2007, Arkansas prohibits state agencies from entering into contracts with businesses that knowingly employ or contract with "illegal immigrants." Prospective contractors and sub-contractors employed by the state under contracts valued at $25,000 or more are required to certify that they do not, at the time of certification, employ or contract with undocumented workers. Violators may be liable to the state for any actual damages incurred. The state anticipates the use of an Internet-based application that must be completed prior to the award of a contract.

Colorado—All employers, regardless of size or trade, must maintain copies of documentation in support of Form I-9. In addition to completing an I-9 form, Colorado employers must complete an affirmation of legal work status within twenty days of a new hire, that confirms the employer has met the following four requirements: (1) It has examined the legal work status of each new employee hired after January 1, 2007; (2) It has retained copies of required I-9 documents for examination; (3) It has not altered or falsified the documents presented by the employee; and (4) It has not knowingly hired an unauthorized worker. The employer must keep an electronic or written copy of the affirmation with supporting documents. Additionally, effective August 7, 2006, state contractors are required to verify the legal status of all new hires using the DHS' Basic Pilot Program. Lastly, employers seeking to qualify for a grant, loan, or performance-based incentive from the Colorado Economic Development Commission must verify the work authorization and prove the legal status of all employees. Violators may be required to repay the award and became ineligible for an economic development incentive for five years from the date of repayment.

Georgia—Public employers, state contractors and sub-contractors with over 500 employees must use the

Basic Pilot Program to verify the status of newly hired employees. Public employers, state contractors and sub-contractors with 100 or more employees must comply with Georgia's verification requirement by July 1, 2008; all other public employers and state contractors have until July 1, 2009, to register and participate in a federal work authorization program.

Iowa—Any business that receives economic development assistance from the State of Iowa must provide periodic assurances that all their positions are filled solely by individuals authorized to work in the United States.

Massachusetts—Any contractor doing business with an Executive Branch agency must certify, as a condition of receiving funds from the State, that it will not use unauthorized workers. Currently, all contracts with such agencies must include a Certification Form that is available from the Commonwealth's Office of the Comptroller (http://www.mass.gov/Aosd/docs/policy/updt0725.doc).

Oklahoma—Effective November 1, 2007, Oklahoma requires all public employers, as well as their contractors and sub-contractors, to use a "status verification system" to verify the immigration status of employees. The State recognizes the Basic Pilot Program and the Social Security Number Verification Service as acceptable forms of status verification systems. The requirement to use a status verification system becomes effective July 1, 2008, and applies to contracts entered into for the physical performance of services after November 1, 2007, and only to new employees hired after that date.

Tennessee—No state entity may contract to acquire goods or services from any person or business that knowingly utilizes the services of unauthorized workers in the performance of the contract. Likewise, persons who knowingly utilize the services of unauthorized workers are prohibited from using such employees to perform work on contracts with the state or state entities. State contracts must contain standardized language stating that the contractor does not and will not knowingly utilize the services of unauthorized workers. Persons and companies doing business with the state or a state entity must attest, using a standardized form provided by the Department of Finance and Administration, that they will not knowingly make use of the services of unauthorized workers in the performance of a contract. These attestations must be updated semi-annually, maintained by the state contractor, and be available to state officials, who are authorized to make random checks for compliance. State contractors must also require the semi-annual attestations from all subcontractors utilized to perform work under a state contract.

Texas—Effective September 1, 2007, Texas will require any business that applies to the State of Texas for a public subsidy to include in the application a statement certifying that the business does not and will not knowingly employ an unauthorized alien.

Temporary Suspension of U.S. Passport Requirements

The DOS and DHS have announced a temporary suspension of the passport requirements in connection with the Western Hemisphere Travel Initiative (WHTI). Through September 30, 2007, U.S. citizens who have applied for, but not obtained, a U.S. passport and who are entering or reentering the U.S. by air from Canada, Mexico, the Caribbean, or Bermuda will be permitted to enter with a government-issued photo identification document and official proof of a pending passport application from the DOS. Children, 16 years and under, traveling with their parents or legal guardian will be permitted to travel with official proof of a pending passport application. Applicants may obtain official proof of their pending applications at http://www.travel.state.gov/passport/get/status/status_2567.html.

The temporary suspension resulted from the increased demand for U.S. passports since the implementation of the WHTI, which requires U.S. citizens and nonimmigrants who are citizens of Canada, Mexico, and Bermuda to present valid passports or other acceptable travel documents when entering or reentering the United States by air from within the Western Hemisphere. Note that the temporary suspension of WHTI passport requirements applies only to U.S. citizens; the passport requirements remain in effect for non-immigrants who are citizens of Canada, Mexico, and Bermuda.

Temporary Suspension of I-140 Premium Processing Services

On June 28, 2007, USCIS announced that it would temporarily suspend Premium Processing Services for all I-140 Petitions for Immigrant Workers as of June 29, 2007. We will keep you advised as to when the suspension is lifted.

New Modifications to Exchange Visitor Training Programs

Effective July 19, 2007, the DOS issued a final rule modifying the Exchange Visitor Program for trainees and interns. The rule establishes a new internship program and modifies the selection criteria for participation in a training program. The final rule also formalizes the requirement that each trainee or intern demonstrate sufficient fluency in English prior to admission in an exchange visitor program. Such fluency can be established through a recognized English test, signed documentation from an academic institution or English language school, or through a documented interview conducted by program sponsors or a third party in person, by videoconferencing, or by Web camera.

Exchange Program Sponsors must screen and enter into written agreements with third parties who assist them in recruiting, selecting, screening, orienting, placing, training, or evaluating foreign nationals who participate in training and internship programs. The final rule also establishes a new Form DS-7002, Training/Internship Placement Plan, which must be completed for each trainee and intern prior to the issuance of the Form DS-2019.

If you have any questions or wish to discuss these topics further, please contact Gabrielle M. Buckley at 312-609-7626 gbuckley@vedderprice.com, or P. Michelle Jacobson at 312-609-7761 mjacobson@vedderprice.com.

The *Immigration Law Alert* is published periodically by the law firm of Vedder, Price, Kaufman & Kammholz, P.C. It is intended to keep our clients and interested parties generally informed on developments in the business immigration industry. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this bulletin may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

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The Vedder Price Business Immigration Group

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Specific services include:

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- Preparation and processing of permanent resident visas for executives and other professional employees.
- Due diligence regarding immigration law issues in corporate mergers, acquisitions, divestitures and other forms of corporate reorganization.
- Counseling employers regarding compliance with immigration laws (IRCA) in order to avoid civil and criminal penalties.
- Assisting in processing visa applications and resolving other State Department matters in U.S. Embassies and Consulates around the world.
- Assisting employers with their non-U.S. immigration needs through our network of attorneys licensed in other countries.

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