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Newsletter

Immigration Law Update

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

April 2009

- **H-1B Status**
- **REMINDER: New I-9 requirements go into effect 04/03/2009;**
- **TARP Funding and implications on H-1B hiring requirements;**
- **Filing deadline for H-1B cap cases extended to 04/07/2009;**
- **iCERT Visa Portal System to be implemented 04/15/2009;**
- **Western Hemisphere Travel Initiative goes into effect 06/01/2009; and**
- **Cap-gap extension of OPT for F-1 students**

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 Status

Please be aware that U.S. Citizenship and Immigration Services (USCIS) currently estimates that approximately half of the 65,000 allotted H-1B numbers for Fiscal Year 2010 are still available. As previously announced, USCIS will continue to accept H-1B filings until the cap has been reached.

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.

Form I-9 Revisions

As mentioned in our February 2009 newsletter, U.S. Citizenship and Immigration Services (USCIS) has revised the Employment Eligibility Verification (I-9) Form and requirements. The new requirements include a revised list of acceptable identity documents and further specify that expired documents are not considered acceptable forms of identification. **The new changes and form will go into effect April 3, 2009.**

Employers must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. The list of approved documents that employees can present to verify their identity and employment authorization is divided into three sections: List A documents verify identity and employment authorization, List B documents verify identity only, and List C documents verify employment authorization only.

The new I-9 Form and requirements eliminate Forms I-688, I-688A, and I-688B (Temporary Resident Card and older versions of the Employment Authorization Card/Document) from List A. List A has also been revised to include the new U.S. Passport Card, foreign passports containing specially-marked machine-readable visas, and documentation for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI).

Employers must use the revised Form I-9 for all new hires and to re-verify any employee with expiring

employment authorization as of April 3, 2009. The Handbook for Employers, Instructions for Completing the Form I-9 (M-274) has been updated to reflect these changes and is available on the USCIS website, at http://www.uscis.gov/files/nativedocuments/m-274_3apr09.pdf.

The current version of the Form I-9 (dated 06/05/2007) will no longer be valid as of April 3, 2009. **The new version of the Form I-9, which goes into effect on April 3, 2009, is available on the USCIS website, at http://www.uscis.gov/files/form/I-9_IFR_02-02-09.pdf. A copy of the new Form I-9 is attached to this newsletter for your reference.**

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

New Requirements for Hiring H-1B Workers – APPLIES ONLY TO COMPANIES RECEIVING TARP FUNDING

Employers who receive funding through the Troubled Asset Relief Program (TARP) or under section 13 of the Federal Reserve Act (covered funding), must now meet additional requirements before they may hire a foreign national to work in H-1B status. On February 17, 2009, the new "Employ American Workers Act" (EAWA) was signed into law by President Obama as part of the American Recovery and Reinvestment Act. The law was enacted to ensure that companies receiving covered funding do not displace U.S. workers. Under the new legislation, any company that has received covered funding and that seeks to hire a new H-1B worker is considered an "H-1B dependent employer." H-1B dependent employers are required to make additional attestations to the U.S. Department of Labor (DOL) when filing the Labor Condition Application (LCA).

EAWA applies to any LCA and/or H-1B petition filed on or after February 17, 2009 for employment by a **new employer**. The requirements also apply to new hires based on an H-1B petition approved prior to February 17, 2009, if the H-1B employee had not actually commenced employment prior to February 17, 2009.

EAWA does not apply to H-1B petitions seeking to change the status of a beneficiary already working for the employer in another work-authorized category. It also does not apply to H-1B petitions seeking an extension of stay for a current employee with the same employer.

A new version of the H-1B Data Collection and Filing Fee Exemption Supplement has been released which now asks if an employer has received TARP funding. At the moment, however, USCIS is not requiring use of the revised form for FY 2010 H-1B filings.

Please keep in mind that a valid LCA must be on file with the DOL at the time the H-1B petition is filed with USCIS. USCIS warns that if the petitioner indicates on the petition that it has received covered funding but the LCA does not contain the proper attestations relating to H-1B dependent employers, the H-1B petition will be denied.

If your company has received TARP funding and has recently filed an H-1B petition, please contact our office so that we may determine if the petition requires revision under the new EAWA requirements.

H-1B Lottery and Extended Filing Deadlines

As most of our readers are already aware, April 1, 2009 was the first day USCIS began accepting H-1B petitions (requesting new employment) for the 2010 fiscal year, which begins October 1, 2009. USCIS has determined that if a sufficient number of cases are received within the first five business days of April to reach the H-1B cap, then the H-1B lottery system will go into effect and will be based solely on petitions received during this five business day period. **The period began April 1, 2009 and ends on April 7, 2009.** Filing receipts will not be issued, however, until USCIS has determined that a sufficient number of H-1B petitions have been received within the April 1 - 7 period. After the H-1B lottery is conducted, those cases that have been selected will be issued a filing receipt. USCIS has indicated that all cases received between April 1, 2009 and April 7, 2009 will be given the same receipt date of April 8, 2009.

If USCIS concludes that an insufficient number of cases have been received between April 1, 2009 and April 7, 2009, they will continue to accept H-1B filings until the cap has been reached.

iCERT Visa Portal System

The new iCERT Visa Portal System for Labor Condition Applications (LCAs), a preliminary step in the preparation of an H-1B petition, will go into effect on April 15, 2009. Dual use of the new iCERT System and the old system will continue until May 14, 2009. Under the new system, LCAs will no longer receive automatic certification.

Western Hemisphere Travel Initiative

The Western Hemisphere Travel Initiative (WHTI) was developed as a result of the Intelligence Reform and Terrorism Prevention Act of 2004. The initiative requires U.S. and Canadian travelers to present a valid passport or other acceptable document providing evidence of identity and citizenship when entering the U.S. U.S. Customs and Border Protection announced that the implementation of WHTI will enable the Department of Homeland Security to quickly and reliably identify travelers entering the U.S., thereby facilitating entry for U.S. citizens and foreign visitors while strengthening U.S. border security.

WHTI will go into effect on June 1, 2009 for travelers entering the U.S. by land or sea. The initiative previously went into effect for air travelers on January 23, 2007.

Cap Gap Extension of Optional Practical Training

Students working in the U.S. pursuant to F-1 Optional Practical Training (OPT) may now be eligible to continue working beyond the expiration date of their employment authorization documents (EADs) if they are the beneficiaries of pending or approved H-1B petitions. For specific information concerning eligibility for cap-gap extensions of OPT, please refer to the U.S. Immigration and Customs Enforcement memo available at <http://aila.org/content/default.aspx?docid=28473>.

For additional information about any of the topics presented here, please **contact us**.

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