GT GreenbergTraurig

# Immigration Observer

July 2010

**In This Issue:**

**H-1B AND OTHER NON-IMMIGRANT VISA NEWS**
Department of State Announces Increase in Application Fees..1

USCIS Continues to Accept FY 2011 H-1B Cap Petitions…..2

USCIS Proposed Changes to Form I-129 Target Third-Party Placement….2

USCIS Sued over Memo Regarding H-1B Employer-Employee Relationship .....2

**IMMIGRATION POLICY AND PROCEDURAL NEWS**
Comprehensive Immigration Reform Reenters the Spotlight .....3

DHS Designates Greece for the Visa Waiver Program .....6

Grant of Deferred Enforced Departure Extended for Liberians and How to Record on Form I-9 ..6

EB-5 Investor Program…7

**RESOURCES**
July 2010 Visa Bulletin .....7
Consular Corner .....7


## H-1B And Other Non-Immigrant Visa News

### Department of State Announces Increase in Application Fees

The Department of State issued an interim final rule on May 20, 2010, that will increase several categories of visa fees effective June 4, 2010. The new fee structure will be as follows:

- The application fee for petition-based nonimmigrant visas (categories H, L, O, P, Q, and R) will increase to $150.
- The application fee for E nonimmigrant visas will increase to $390.
- The application for K nonimmigrant visas will increase to $350.
- The border crossing card fee charged to Mexican citizen minors who apply in Mexico, and whose parent or guardian already has a border crossing card or is applying for one, will increase to $14.
- The application fee for the remaining non-petition-based nonimmigrant visa fees and border crossing card application processing fees will increase to $140.

The Department of State has stated that the fees are being adjusted to ensure that they are able to meet the costs of providing consular services following an independent cost of service study which found the current cost structure to be insufficient. The new fee structure is intended to accurately reflect the cost of providing consular services for each visa category.

Written comments on the interim final rule must be received on or before July 19, 2010, at http://www.regulations.gov/index.cfm.

The final interim rule can be found here.

On June 28, 2010, the Department of State also announced a new schedule for consular fees to take effect including passport, immigrant visas, and other

consular fees on July 13, 2010. The schedule can be found at www.travel.state.gov.

## USCIS Continues to Accept FY2011 H-1B Cap Petitions

U.S. Citizenship and Immigration Services (USCIS) is reporting that as of June 25, 2010, approximately 33,500 H-1B cap-subject petitions have been filed for Fiscal Year 2011. USCIS has received approximately 23,500 H-1B petitions counting towards the 65,000 general cap and approximately 10,000 H-1B petitions for individuals with advanced U.S. degrees. While the H-1B cap appears to be proceeding slowly, it is impossible to predict when the cap will be reached. We recommend filing any potential H-1B cap cases immediately.

Last year, the H-1B cap was not reached until late December. In 2008, USCIS received approximately 163,000 petitions during the initial five-day H-1B cap filing period, and among those, USCIS conducted a random selection process to select 65,000 petitions for the H-1B cap plus 20,000 petitions for the advanced degree cap. The difference between the 2008 and the 2009 and current H-1B caps is attributable to the downturn in the economy.

## USCIS Proposed Changes to Form I-129 Target Third-Party Placement

The comment request period of U.S. Citizenship and Immigration Services' (USCIS) proposed changes to the Form I-129 Petition for Nonimmigrant Worker expired on April 9, 2010. If accepted, the revised form will affect employers who utilize third-party placement as well as employers whose employees frequently change worksite locations.

The proposed revisions would require additional information and attestations from petitioners who utilize third-party placement. Specifically, the new form would require an employer petitioning on behalf of an employee who would be working off-site to provide the name and address of the compan(ies) where he or she would be working, as well as the name, title and phone number of a contact person at each off-site location. In terms of attestations, the new form would require that petitioners who would place their H-1B workers off-site sign statements certifying that they will maintain a valid employer-employee relationship and will pay the "prevailing rate of pay at any and all off-site locations."

Significantly, the proposed instructions to the new Form I-129 include a definition of a "material change" to employment that would require an employer to amend its employee's H-1B petition. The proposed instructions state that a material change in the terms and conditions of employment would include "a change in primary job responsibilities or geographic location of the position." [emphasis added] The proposed instructions appear to contradict previous USCIS policy, which held that employers were required to file a new Labor Condition Application (LCA) when an H-1B employee changed worksites, but that an H-1B amendment petition was not necessary. Notably, this definition of "material change" does not exist in the regulations.

## USCIS Sued over Memo Regarding H-1B Employer-Employee Relationship

For more than forty years, U.S. staffing companies, most of which are small businesses, have been providing a workforce of temporary and long-term engineers, health care professionals and others in specialty occupations to the federal government, government contractors, manufacturers, schools, universities and non-profit organizations. Many of these trained professionals come to the U.S. on H-1B visas because there are an insufficient number of U.S. citizens in a particular profession and geographic location. However, over the past

two years, United States Citizenship and Immigration Services ("USCIS") has changed existing law governing these visa applications for professionals by challenging the established notion of employer/employee relationships through Requests for Evidence (RFEs) and denials without utilizing the rulemaking process of notice and comment.

On January 8, 2010, USCIS issued a memorandum to adjudicators which in essence put onto paper its practices of the previous two years by providing guidance on what employers must do to establish a valid "employer-employee relationship" in order to qualify their petitions for the H-1B specialty occupation classification. The memorandum emphasizes that the "right to control" is the main factor in establishing an employer-employee relationship and directs that petitioners must submit sufficiently detailed evidence with their petitions that demonstrates a right to control. The memo further provides a non-exclusive list of documentation that can be submitted as evidence of the employer-employee relationship.

In the months following the memo, U.S. employers in the staffing and IT sectors have experienced denials of H-1B petitions where the new guidelines are being applied. U.S. staffing agencies providing workers across a number of industries are facing an uphill battle as they are now forced to take additional steps to validate the employment relationships and the legitimate use of the H-1B program. The struggle has now escalated to the next level with a law suit being filed against USCIS. The case, *BroadGate v. USCIS*, was filed on June 8, 2010, against USCIS, USCIS Director Alexander Mayorkas, the Department of Homeland Security (DHS), and DHS Secretary Janet Napolitano. The Plaintiffs are seeking to overturn the rule established through the internal memorandum based on a failure to follow proper rule-making procedures. Plaintiffs assert that at its core the memorandum precludes staffing companies from obtaining H-1B status for its employees based upon the assertion and assumption that the placement of an employee at a third-party worksite on its face amounts to a lack of an employer-employee relationship.

As Counsel for the Plaintiffs, Greenberg Traurig attorneys Robert P. Charrow, Laura Klaus, Craig Etter and Laura Reiff filed a Complaint and Application for Preliminary Injunction with the United States District Court for the District of Columbia on behalf of several Plaintiffs, including the Information Technology (IT) services companies BroadGate Inc., Logic Planet Inc., and DVR Softek Inc., and the American Staffing Association and TechServe Alliance, both trade associations serving the U.S. staffing industry at large, and the IT services industry, respectively. In its Complaint, Plaintiffs allege the illegality of the USCIS rule for reasons that include violations of the requisite rule-making process under the Administrative Procedure Act (APA), failure to complete an analysis of the impact of the rule on small entities as required by the Regulatory Flexibility Act and the arbitrary and capricious nature of a rule that targets a specific business model while supplanting long-held existing law without notice, public hearing or good cause.

# Immigration Policy and Procedural News

## Comprehensive Immigration Reform Reenters the Spotlight

A whirlwind of events this spring have led to Comprehensive Immigration Reform ("CIR") once again making it to the forefront of national politics, reigniting the hopes of many that a bill could be drafted and passed this year. Unfortunately, however, there appears to be too much politics and not enough will power to actually get good policy through.

On April 29th, one day after President Barack Obama indicated that he would pull back from CIR in 2010 in the wake of the pressure he exerted on Congress to pass health care reform in March and while pushing for an energy and climate bill, a group of Democratic Senators unveiled their "Conceptual Proposal for Immigration Reform" and started calling on fellow Senators from both parties to join forces with them to flesh it out into an actionable bill.

Highlights of this latest CIR proposal include the following:

- Issuance of biometric social security cards within 18 days of enactment that would include an electronically coded micro-processing chip containing a unique biometric identifier for the card-bearer to serve as lawful work authorization for all those authorized to work in the U.S., including U.S. citizens. The proposal includes privacy protections such as that the information on the card could not be used by employers for any purpose other than employment verification.
- Creation of a Biometric Enrollment, Locally-stored Information, and Electronic Verification of Employment ("BELIEVE") system of employment verification that would involve scanning the biometric social security card in a scanner designed for that purpose. The BELIEVE system would take the place of all previous employment verification methods, such as E-Verify.
- A 300% increase in civil fines for knowingly hiring or continuing to employ unauthorized workers or for violating the anti-discrimination laws.
- Immediate availability of green cards for foreign students with U.S. job offers and U.S. advanced degrees in science, technology, engineering or mathematics.
- Elimination of the per-country employment-based immigration caps.
- Added requirements for employers petitioning for H-1B workers, including Internet posting of the position and expanding requirements currently only applicable to employers who are H-1B-dependent.
- Limits on the number of H-1B and L-1 employees for employers with 50 or more workers.
- Limits on the length of time for which employers may hire certain L-1 employees (with a waiver option available).
- A system for hiring lower-skilled workers that would shift according to the unavailability of U.S. workers.
- Increased requirements for employers seeking workers under the H-2B program, including payment of higher wages and advanced recruiting of U.S. workers.
- Creation of a provisional H-2C visa for non-seasonal, non-agricultural workers that would include a path to lawful permanent residence.
- Creation of a Commission on Employment-Based Immigration that would be charged with issuing employment-based immigration recommendations to Congress and would have the power to declare "immigration emergencies" requiring Congressional votes on its recommendations.
- Creation of a compulsory two-phased system for addressing the undocumented population consisting of 1) mandatory registration for Lawful Prospective Immigration ("LPI") status upon satisfaction of criminal background check and payment of fees and taxes; and 2) application for lawful permanent residence after clearing of current visa backlogs and satisfaction of additional requirements including additional background checks, fines, and English language proficiency.
- Establishment of a national birth and death registration system.
- Reaching of certain border security enhancement benchmarks prior to allowing adjustment of status by the undocumented.
- Border enforcement without racial profiling.
- Federal preemption of all state immigration laws.

- Creation of an enhanced entry-exit system that would provide for tracking and expedited removal of nonimmigrant overstays and would exclude participating countries from the Visa Waiver Program that are determined to have a high percentage of overstays.

This latest effort to enact CIR, which was co-drafted by Senate Majority Leader Harry Reid (D-NV), Senator Robert Menendez (D-NJ), and Chair of the Committee of the Judiciary's Subcommittee on Immigration, Refugees and Border Security Senator Charles Schumer (Dem.-NY), comes on the heels of Senator Lindsey Graham (R-SC) walking away from the energy and climate bill favored by Democrats for which he had been working to summon his party's support out of reported frustration with Senator Reid for vowing to push forward with CIR in 2010. Senator Graham had up to that point been the most recent Republican Senator to visibly work across the aisle for CIR, having previously partnered with Senator Schumer in a bipartisan effort to craft a framework set forth in a jointly-authored article published in The Washington Post on March 19th that was lauded by President Obama for being in sync with discussions he had with the two Senators during the Summer of 2009.

Support from both parties, in addition to considerable pressure from President Obama, would be needed to pass CIR this year, and as this year's election cycle heats up and the fate of the seats of several Democratic incumbents hangs in the balance, we can expect certain members to continue the rallying cry for immediate action, while others, including several Democrats, could maintain that now is not the time due to concerns about the economy and unemployment among their constituencies. On the Republican side, there have been indications that Senator John Cornyn (R-TX), ranking member of the Committee of the Judiciary's Subcommittee on Immigration, Refugees and Border Security, could be willing to work with Democrats on this latest draft.

However, the current lack of support among many members of Congress as well as economic concerns are still not likely to push CIR back into the shadows, especially given the furor over the April 23rd passage of SB 1070 in Arizona, the law that has become notorious for its sanctioning of law enforcement officers to demand proof of legal immigration status upon "reasonable suspicion" that an individual is undocumented. That law, scheduled to take effect within 90 days of enactment if not blocked by litigation, has spurned mass demonstrations in 80 cities across the country, lawsuits, and boycotts, while highlighting the disparity among state immigration laws and the need for a rational federal immigration scheme that would cure the conflicting patchwork of laws among the states. It is interesting to note that the Solicitor General of the United States did send a brief to the Supreme Court recommending that the Court take up the other controversial Arizona Law requiring mandatory participation in E-Verify by all employers. Arizona is the focus of much of the immigration debate today.

For his part, President Obama praised the latest CIR draft in a statement issued by the White House on April 29th in which he reaffirmed his Administration's commitment to playing an active role in engaging both sides to create a fixable solution to our broken immigration system, although he did not include a specific timeframe for doing so. The President is scheduled to speak about the CIR on July 1st at American University.

In commending the CIR draft, the President noted its similarity to the earlier framework created by Senators Graham and Schumer, which consisted of "four pillars" involving a biometric social security card requirement for all U.S. workers; increased and enhanced border security and domestic immigration enforcement; a temporary worker program, including a system for admitting lower-skilled workers based on U.S. economic need; and a path to legalization for the undocumented that would include background checks and an English-language requirement. Again, the chances of a bill actually being enacted before the August recess are slim to none.

Congress is embroiled in partisan politics and moreover, the Judiciary Committee has a Supreme Court nominee to contend with this Summer.

## DHS Designates Greece for the Visa Waiver Program

The Department of Homeland Security (DHS) has added Greece to the list of countries that may participate in the Visa Waiver Program (VWP), as detailed in a final rule published in The Federal Register on March 31, 2010. As such, citizens and eligible nationals of Greece who are otherwise admissible to the U.S. may now enter the country without first obtaining a nonimmigrant visa for purposes of business or pleasure for a period of ninety days or less. At this time, other countries designated for the VWP 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.

Decisions to designate countries for the VWP rest with Secretary of Homeland Security Janet Napolitano in consultation with Secretary of State Hillary Rodham Clinton, and requirements set forth in the Immigration and Nationality Act (INA) must be met in making the determinations. Such requirements include that the country being considered for designation issues acceptable machine-readable passports, that the country's designation would not negatively affect U.S. security, and that the country has an agreement with the United States to share information on security threats by its citizens or nationals.

It will be interesting to monitor whether the U.S. government will consider revoking Greece's status due to the current economic situation in that country. In 2002, the United States removed Argentina from the list of designated VWP countries after an economic crisis increased the possibility of individuals abusing the program to enter the United States and overstay their allocated time.

## Grant of Deferred Enforced Departure Extended for Liberians and How to Record on Form I-9

In a memorandum issued March 18, 2010, President Barack Obama directed Secretary of Homeland Security Janet Napolitano to extend Deferred Enforced Departure (DED) for Liberians for 18 months, from April 1, 2010 to September 30, 2011. This DED extension applies only to Liberian nationals and individuals without nationality who last resided in Liberia who are physically present in the U.S., have held Temporary Protected Status (TPS) since September 30, 2007, and were covered by DED through March 31, 2010. The extension does not apply to certain individuals convicted of crimes, those subject to TPS bars, and those whose removal is determined to be in the interest of the United States.

Individuals eligible for this DED extension received an automatic six-month renewal of their work authorization (Employment Authorization Document or "EAD"), and must apply separately for the full 18-month EAD renewal as well as for permission to travel during the DED validity period.

Employers may continue to employ individuals affected by this designation by attaching the *Federal Register* notice to the employee's I-9 (if the employee's EAD has expired) and updating Section 3 of the employee's I-9 upon receipt of the employee's new EAD card.

DED is a temporary protection from removal designated by the President of the United States for individuals from home countries deemed to be unsafe to return to for a variety of reasons including ongoing armed conflict and environmental disasters.

### EB-5 Investor Program

Senior Attorneys with Greenberg Traurig participated in the EB-5 Stakeholder meeting held in Washington D.C. on June 16, 2010. The Office of Public Engagement organized the program and the Service Center Operations Directorate as well as other USCIS subject matter experts attended. While much of the session was spent on reviewing the basics of the program, the government did provide a PowerPoint with the latest statistics on Regional Centers, processing times, as well the information on the new proposed forms (I-924 and I-924A), inquiries and expedite requests. GT has a full service, sophisticated EB-5 team comprised of Immigration, Corporate, Litigation, Real Estate, Advocacy and Tax experts available to plan and execute successful deals as well as to challenge denials and respond to USCIS Requests for Additional Evidence. For more information on setting up Regional Centers, organizing EB-5 projects, individual investments or general queries please contact Dawn M. Lurie at luried@gtlaw.com

## Resources

### July 2010 Bulletin

Due to continued heavy applicant demand primarily by USCIS offices for adjustment of status cases, the annual limits for the Mexico Employment Third and Third preference Other Worker categories were reached in June. As a result, both categories have become "unavailable." Visa numbers will become available again in October of 2010 with the start of the new fiscal year.

### Consular Corner

#### DHS Implements Electronic System, Eliminates Paper I-94W for Visa Waiver Program

Department of Homeland Security Secretary Janet Napolitano announced on May 20th that travelers from nations participating in the Visa Waiver Program (VWP) will no longer be required to utilize the paper arrival/departure form (Form I-94W) to travel to the United States.

The paper-based system will be replaced by the Electronic System for Travel Authorization (ESTA), an electronic system which will require travelers to provide basic biographical, travel and eligibility information prior to travel. Customs and Border Patrol recommends that travelers submit ESTA applications as soon as they begin making travel plans. Applications may be submitted any time prior to travel and will remain valid for two years after approval, or until the applicant's passport expires.

ESTA will be implemented on a rolling basis with all airports using the new system by the end of this summer.

**Sujata Ajmera, Associate**
ajmeras@gtlaw.com

**Mahsa Aliaskari, Of Counsel**
aliaskarim@gtlaw.com

**Lindsey Baldwin, Associate**
baldwinl@gtlaw.com

**Marcela Bermudez, Associate**
bermudezm@gtlaw.com

**Jennifer Blloshmi*, Assistant Director**
bloshmij@gtlaw.com

**Kristin Bolayir*, Assistant Director**
bolayirk@gtlaw.com

**Patricia A. Elmas*, Assistant Director**
elmasp@gtlaw.com

**Patricia L. Gannon, Shareholder**
gannonp@gtlaw.com

**Kevin Lashus, Of Counsel**
lashusk@gtlaw.com

**Oscar Levin, Shareholder**
levino@gtlaw.com

**Dawn M. Lurie, Shareholder**
luried@gtlaw.com

**Montserrat Miller, Of Counsel**
millermo@gtlaw.com

**Maggie Murphy, Of Counsel**
murphymar@gtlaw.com

**Christina Pitrelli, Associate**
pitrellic@gtlaw.com

**Laura Foote Reiff, Shareholder**
reiffl@gtlaw.com

**Glenn E. Reyes*, Director**
reyesg@gtlaw.com

**Rebecca B. Schechter, Associate**
schechterr@gtlaw.com

**Martha J. Schoonover, Shareholder**
schoonoverm@gtlaw.com

**Adelaida Vasquez, Associate**
vasqueza@gtlaw.com

**Not admitted to the practice of law*

## International Travel:

In planning international travel, all foreign nationals must ensure that they carefully review their current immigration documentation to make sure that they have all of the appropriate travel documentation required to return to the United States. If in nonimmigrant status, individuals typically must have a valid visa in their passports for that category. Advance planning can make the visa application process smooth and relatively painless. Most visa applicants will be required to have an in-person interview at a U.S. embassy or consulate. Therefore, we suggest that foreign nationals carefully review the current visa wait times for information on interview appointment availability and timeline for visa issuance at the embassy or consulate. In advance of travel, all supporting documentation should be carefully reviewed and instructions regarding the on-line application forms and visa fee payment should be closely followed in order to avoid delays.

Please consult with a GT attorney for further information and prior to traveling outside of the United States.

++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++

**Subscribing / Unsubscribing**

*To subscribe or unsubscribe, please click here.*

**General Information**

*Questions or comments? Please send an e-mail to the GT Observers' Editors Dawn M. Lurie and Mahsa Aliaskari at: luried@gtlaw.com or aliaskarim@gtlaw.com.*

*Want to schedule a consultation? Please send an e-mail to: immconsult@gtlaw.com.*

**Resources**

July 2010 Visa Bulletin
Visa Wait Times
U.S. Citizenship and Immigration Services- USCIS Processing Time Information
National Benefits Center

*The materials contained in this newsletter and on the Greenberg Traurig LLP website are for informational purposes only and do not constitute legal advice. Receipt of any GT email newsletter or browsing the GT Business Immigration website does not establish an attorney-client relationship. Copyright © 2001-2010 Greenberg Traurig All Rights Reserved.*