FOSTER QUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©

Monday, January 18, 2010

1. U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) SECRETARY JANET NAPOLITANO DESIGNATES TEMPORARY PROTECTED STATUS (TPS) FOR HAITIANS PRESENT IN THE UNITED STATES AS OF JANUARY 12, 2010

On January 15, 2010, U.S. Department of Homeland Security (DHS) Secretary Janet Napolitano announced the designation of Temporary Protected Status (TPS) for Haitians present in the United States as of January 12, 2010.

In the DHS Press Release dated January 15, 2010, Secretary Napolitano stressed that only those Haitians present in the United States as of January 12, 2010, will be eligible for TPS. Those who arrived in the United States after January 12th will be ineligible to apply for TPS and must comply with the terms and conditions of their arrival, including applicable departure dates.

Temporary Protected Status enables eligible Haitians to register their status lawfully and apply for an Employment Authorization Document (EAD) card to evidence their employment authorization. Individuals approved for TPS may not be removed from the United States during the period of their designation, which is 18 months, or longer if the designation is renewed. Eligible Haitians may apply for TPS even if they presently reside in the United States without authorization.

Applicants for TPS must file their applications with U.S. Citizenship & Immigration Services (CIS) within the 180-day registration period. The 180-day period will begin on the date the DHS publishes the TPS designation in the Federal Register, which is anticipated this week. To provide additional information on application for TPS, U.S. Citizenship & Immigration Services (CIS) has published a series of Questions & Answers on the CIS website.

Temporary Protected Status may be designated for the nationals of any country experiencing exceptional turmoil. Currently TPS designation is in effect for nationals of the following additional countries: El Salvador, Honduras, Nicaragua, Somalia, and Sudan. By its nature, TPS is not a permanent status and does not offer a route to permanent residency in the United States.

U.S. Citizenship & Immigration Services has also published Questions & Answers regarding additional measures the agency is taking to assist Haitians who presently have applications for immigration benefits pending with the CIS. Under certain circumstances the CIS will expedite benefits applications, though all applicable background and security checks will still apply. Additionally, under limited circumstances, the CIS will forgive certain periods of "overstay", for those whose authorized admission expired after January 12, 2010, and will entertain Applications to Extend or Change Status after an existing status has already expired for those who were unable to timely depart the United States due to conditions following the earthquake in Haiti.

For more information regarding initial registration of TPS for qualifying Haitians in the United States, potentially expedited immigration benefits for Haitians, or the benefits of TPS for your employees, please contact your FosterQuan immigration attorney.

FosterQuan will continue to monitor changes that impact the availability of immigration status and benefits for those impacted by the recent earthquake and will make future information, including application deadlines and details, available via future Immigration Updates© as appropriate, and on our firm's website.

2. NEW H-1B PETITIONS CAN BE FILED BEGINNING APRIL 1, 2010; Employers Should Identify Candidates and Initiate New H-1B Petitions Now for Filing on April 1, 2010

Beginning April 1, 2010, U.S. Citizenship & Immigration Services (CIS) will accept H-1B nonimmigrant visa petitions seeking allocation of Fiscal Year 2011 (October 1, 2010 through September 30, 2011) H-1B numbers. H-1B petitions may be filed on behalf of beneficiaries qualified for employment in a "Specialty Occupation," one that ordinarily requires at least a Bachelors Degree or its equivalent. Individuals who do not hold a Bachelors Degree may still qualify for H-1B status based on a career of progressively-responsible employment experience.

Annual H-1B Visa Quota

The H-1B visa quota for each fiscal year is 65,000. Of this number, 6,800 are set aside for citizens of Chile and Singapore; therefore, the cap is 58,200, although an unknown quantity of unused numbers from those set aside in the previous year are carried forward to the new fiscal year. An additional 20,000 H-1B numbers are available for candidates who hold at least a Masters Degree or higher from a U.S. institution of higher education.

For several years prior to Fiscal Year 2010, the H-1B cap was reached before the beginning of the new Fiscal Year. Even under current economic conditions, when economic conditions resulted in a pronounced decline in demand for H-1B visas, the Fiscal Year 2010 (October 1, 2009 through September 30, 2010) H-1B cap was reached in December 2009, less than three months into the fiscal year.

Because recent economic indicators show signs of an improvement in economic conditions, the Fiscal Year 2011 cap is expected to be reached earlier this year than last. Employers that have recently identified candidates who missed the Fiscal Year 2010 cap, or who have other candidates under consideration, should begin now to identify all H-1B candidates and initiate new cases for filing H-1B petitions on March 31, 2010, for receipt by U.S. CIS on April 1, 2010.

H-1B Candidates

F-1 Students who have already begun employment, or who will begin employment between now and October, pursuant to Optional Practical Training (OPT) are typically candidates for pursuit of H-1B nonimmigrant status and work authorization. Employers who have F-1 Students working pursuant to a valid OPT Employment Authorization Document (EAD) card are strongly urged to file H-1B petitions on behalf of these candidates on March 31st, even though these students may have almost a year of employment eligibility remaining pursuant to their OPT Employment Authorization Document (EAD) cards.

OPT EAD cards are valid for one year, and may only be extended under limited circumstances. This means students beginning OPT employment in June 2010, will exhaust their OPT employment authorization in June 2011.

Certain TN nonimmigrants are also candidates for H-1B nonimmigrant status. Employers of TN nonimmigrants who wish to retain their TN employees on a longer-term basis should consider filing H-1B petitions on behalf of these candidates on March 31, 2010. Because the number of H-1B visas available each fiscal year is insufficient to meet demand, in some cases it may take more than one attempt to secure an H-1B visa number, and the next available opportunity to file a new H-1B petition will be April 1, 2011. Due to certain restrictions on TN status, employers seeking to pursue U.S. permanent residency on behalf of one or more TN employees are strongly urged to pursue H-1B status on behalf of those employees now.

Individuals who hold L-1B status are often candidates for H-1B nonimmigrant status, particularly if the employer seeks to retain the L-1B employee long-term. L-1B nonimmigrants are allowed only five years of L-1 eligibility. Often an L-1B employee's remaining L-1B eligibility is insufficient to complete the permanent residency process, or to reach a stage in the process that affords continuous work authorization. In such cases it is sometimes possible to change the L-1B employee's status to H-1B status in order to secure additional nonimmigrant status eligibility. Employers who are considering pursuing permanent residency on behalf of one or more L-1B employees are strongly urged to consider seeking a change of status to H-1B for those employees now.

In order to maximize the opportunity to obtain one of the limited H-1B numbers for Fiscal Year 2011, and to avoid a potential gap in employment authorization, *employers are encouraged immediately to identify those employees for whom H-1B petitions will be required*

and to prepare for filing H-1B petitions on March 31, 2010. Do not wait to collect the necessary documents and initiate the H-1B petitioning process. The last day of March is the target for filing new petitions; therefore, petitions should be prepared in advance of April 1, 2010.

Contact your FosterQuan immigration attorney now for assistance in evaluating candidate eligibility, developing an appropriate case strategy, and preparing the necessary documents for filing an H-1B petition on March 31, 2010.

3. U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) PUBLISHES NOTICE OF INFORMATION COLLECTION ON E-VERIFY USAGE FOR PURPOSES OF EVALUATING THE "POSITIVE AND NEGATIVE IMPACTS OF THE PROGRAM IN A MANDATORY ENVIRONMENT"

On January 6, 2010, the U.S. Department of Homeland Security (DHS) published in the Federal Register a Notice of New Information Collection, specifically an E-Verify Data Collection Survey. In its Federal Register Notice, the DHS noted that the information collection would be conducted for the purpose of collecting data to enable the Government to evaluate the "positive and negative impacts of the program ***in a mandatory environment***." (emphasis ours) The DHS is accepting comments on the proposed information collection through March 8, 2010.

The DHS notice signals what is likely a further step toward making the E-Verify program mandatory for all employers in the upcoming years. In a Supporting Statement justifying the information collection, the DHS noted, "Since the potential requirements of a national automated employment verification program for employers, employees, and federal agencies are substantial, DHS believes that a timely evaluation of E-Verify would be beneficial to ongoing immigration reform." The DHS has contracted with Westat to conduct the survey, which will be a confidential, web-based survey scheduled to begin June 14, 2010. The survey methodology has been described in a Supplemental Supporting Statement on E-Verify data collections.

The vast majority of employers do have significant Forms I-9 liability in existence which may be brought to light by the government's data mining of a mandatory E-Verify database. Because the federal government appears increasingly committed to the use of the E-Verify program for the electronic verification of employment eligibility, and appears to be paving the way for the future mandated use of the program, employers are encouraged to take action now to undergo voluntary, independent audits of their employment eligibility verification policies and procedures, and their Form I-9 Employment Eligibility Verification records. Future E-Verify participation will not shield employers from liability associated with Form I-9 violations, but such participation may be more likely to bring those violations to light. For this reason, employers should take steps to minimize and lawfully mitigate potential liability now, through voluntary audits conducted by competent immigration counsel, before program participation becomes mandatory.

For more information on the E-Verify program, why an independent Form I-9 audit and other procedural audits are recommended prior to enrollment in E-Verify, and the development of compliance policies designed to achieve near-perfect compliance, contact your FosterQuan immigration attorney. Members of FosterQuan's Workforce Compliance practice group will be

able to assist with these and other workforce compliance matters to reduce your company's exposure for compliance failures, and to bring greater peace of mind to its compliance officers. Future updates will be made available in FosterQuan Immigration Updates©, and on our firm's website.