

# Immigration Insights

With 2008 underway, here are the hot topics that our clients and friends will want to know about. Additional U.S. immigration-related information is available at <http://immigration.dinslaw.com/>

## REMINDER – FY2009 H-1B FILING SEASON STARTS ON APRIL 1, 2008

by Susan A. Smith, Esq.

The April 1, 2008 date on which U.S. Citizenship and Immigration Services ("CIS") can receive H-1B petitions on behalf of specialty workers is rapidly approaching. Due to the overwhelming demand for the 65,000 visas allocated by Congress (plus an additional 20,000 for those who hold a U.S. master's degree or other qualifying graduate degree), employers that wish to file an H-1B petition must plan to file their cases with CIS on April 1, 2008. For FY2008, CIS received 122,480 petitions on the first day of filing and conducted a random lottery to determine which petitions would garner a spot. The importance of filing an H-1B petition for CIS receipt on April 1 is evident. If you have not already contacted us about filing an H-1B petition for an employee who needs to enter the H-1B category, you should do so immediately.

Persons already counted under the H-1B cap and who need an extension of stay are not subject to the annual limitation. The limitation applies only to persons not yet counted against the cap. CIS has indicated that it is re-examining whether petitioners can file a petition in both the regular 65,000 slot category and also in the 20,000 advanced degree category. CIS had permitted dual filing in past years where the beneficiary held a U.S. graduate degree and could qualify in both categories.

## CONSIDER FILING H-1B PETITIONS NOW FOR EMPLOYEES IN L-1B INTRACOMPANY TRANSFEREE STATUS

by Susan A. Smith, Esq.

The L-1 intracompany transferee visa category applies to foreign nationals who have been employed abroad in executive, managerial or specialized knowledge capacities for at least one continuous year with a commonly-owned foreign company, and who are in the United States to continue rendering services to the same or a related U.S. employer. L-1 executives or managers (L-1A) may remain in the United States for a maximum of 7 years. Specialized knowledge (L-1B) employees may remain for a maximum of 5 years. L-1 transferees are not accorded exemptions from the five and seven year maximums. If an L-1B transferee is being sponsored for Lawful Permanent Residence (LPR) and will



qualify for LPR status in one of the immigrant visa preference categories that is oversubscribed (in other words, is currently backlogged), employers should seriously consider filing an H-1B petition for those L-1B transferees who might be eligible for H-1B specialty worker classification.

H-1B specialty workers are generally limited to 6 years of stay in the United States. However, the law allows H-1B employees to extend their H-1B status beyond the 6<sup>th</sup> year in limited circumstances. These circumstances include situations in which (i) an employer has established a priority date (based on a PERM labor certification or Immigrant Petition filing more than one year before the arrival of the six year H-1B maximum or (ii) an employer has an approved I-140 Immigrant Petition but the beneficiary's priority date is not current. By changing the status of L-1B transferees to H-1B, an employer opens the door to H-1B extensions beyond the 6<sup>th</sup> year, which can become critical in circumstances where the employer's permanent residence case is stuck in the immigration quota system employment-based backlog (such as EB3 beneficiaries and some EB2 beneficiaries from India and China).

To qualify for the H-1B category, the position offered must be a specialty in which a bachelor's degree or its equivalent is normally the minimum

## IMMIGRATION

Led by two Partners who have long been recognized in the field of immigration law by *The Best Lawyers in America* publication, the Dinsmore & Shohl LLP Immigration Group focuses its practice in the area of business immigration law.

The Immigration Group represents a wide range of publicly-traded companies, multinational corporations, privately-held businesses, universities, research institutions, arts, entertainment and professional sports organizations, professors, and professionals with respect to both work visa and permanent resident (green card) cases.

In addition, the members of the Immigration Group have significant experience in many other areas that companies and other institutions may need help with in regard to the U.S. immigration system, including but not limited to visa applications at United States Consulates, labor certification proceedings before the U.S. Department of Labor, I-9 (Employment Eligibility Verification) compliance, immigration policy formulation, naturalization, family immigration law, and NAFTA immigration issues.

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requirement for the position *and* the foreign national holds a bachelor's level degree or its equivalent in the specialty defined by the position (this threshold can be met in some cases through a combination of education and work experience.) It is important to note here that L-1 and H-1B time count against one another, so if an L-1 employee spends 3 years in L-1 status and 1 year in H-1B status, he or she has effectively "used up" 4 years of eligible H-1B time.

Therefore, if an employer has an employee in L-1B status who has been in the United States for two or three years or longer and the employee will likely wind up in the EB3 LPR category, it is important to consider filing an H-1B petition on April 1, 2008. This may help protect the employee from reaching the five year L-1B maximum and having to leave the U.S.

**FORWARD LOOK ON INDIA EB-2 UNAVAILABILITY**

by Susan A. Smith, Esq.

The February and March Visa Bulletins announced that the India EB-2 (employment-based second preference) category is unavailable. This means that natives of India who are the beneficiary of an approved or pending EB2 Immigrant Petition may not apply for permanent residence at this time. According to the U.S. Department of State (DOS), because of increased demand in this category in the fall and through the winter, DOS has indicated that there are no EB-2 immigrant visa numbers remaining for Indian natives in Fiscal Year 2008 (which ends on September 30, 2008). Fiscal Year 2009 visa numbers will become available on October 1, 2008.

The American Immigration Lawyers Association contacted DOS to discuss this issue. DOS indicated that it will closely monitor the usage of visas in the India EB-1 category and will monitor visa numbers sent to consular posts that are returned to DOS for re-allocation. If it appears that India EB-1 category will not exceed the annual limit or any unused visas are returned, the India EB-2 category may become available again in FY2008. This is because unused India EB-1 numbers drop down to the EB-2 category. Such a determination will not be made until the second half of FY2008.

**CBP PROVIDES INFORMATION ON WHO TO CONTACT IF YOU EXPERIENCE PROBLEMS ENTERING THE U.S.**

by Susan A. Smith, Esq.

U.S. Customs and Border Protection (CBP) recently issued a fact sheet that details who one should contact if problems are experienced upon admission to the United States. CBP is authorized to enforce all Homeland Security-related laws and laws of other federal agencies at the border and to conduct searches and examinations necessary to assure compliance with those laws. CBP officials are responsible for inspecting your travel documents upon your entry and are authorized to request detailed information about your travel and conduct an examination of you and/or your luggage. CBP has stated that all such inspections and examinations should be courteous, dignified and professional. CBP has provided the following contact information in case you run into problems.

If you experience repeated referrals for security screening or believe that you have been denied boarding or entry into the U.S. because

of inaccurate information, you should contact Department of Homeland Security Traveler Redress Inquiry Program (DHS TRIP) at:

[http://www.dhs.gov/xtrlsec/programs/gc\\_1169676919316.shtm](http://www.dhs.gov/xtrlsec/programs/gc_1169676919316.shtm)

CBP also has provided a customer service number where you are able to get a response to general or specific questions or concerns about a CBP examination, such as why you were stopped or to request that CBP review and amend its records. You can contact CBP three ways:

Telephone	877-227-5511 for U.S. callers (8:30-5:00 Eastern Time)
Online	Go to <a href="http://www.cbp.gov/xp/cgov/toolbox/questions/">http://www.cbp.gov/xp/cgov/toolbox/questions/</a> and click on "Find an Answer, Ask a Question." A list of answers to commonly asked questions appears and once you click on one, a new tab will open up at the top that will allow you to ask a question directly to a customer service representative.
Mail	Send a letter to CBP Customer Service Center (Rosslyn, VA) 1300 Pennsylvania Avenue NW, Washington DC 2022

**BIOMETRICS APPOINTMENTS CONSOLIDATED**

by Susan A. Smith, Esq.

Effective February 15, 2008, U.S. Citizenship and Immigration Services (CIS) began consolidating biometrics collection for applicants who concurrently file a Form I-485 (Application to Register Permanent Resident Status or Adjust Status) and a Form I-765 (Application for Employment Authorization) at one of CIS' Service Centers. Previously, applicants received two appointment notices to appear at a designated Application Support Center (ASC), but as a result of this change, CIS will collect biometrics data for both applications in one ASC visit. Applicants who filed concurrently before February 15, 2008 will still be required to attend both ASC appointments.

**CIS POLICY CHANGE ON FBI NAME CHECKS THAT ARE DELAYING SOME LONG OVERDUE PERMANENT RESIDENCE APPLICATIONS**

by Douglas Halpert, Esq.

Due to Department of Homeland Security Inspector General recommendations and the fact that CIS has been losing a large number of mandamus lawsuits, CIS has changed its policy of deferring adjudication of many permanent residence applications where the foreign national has been waiting years for a decision but FBI name checks have not concluded. CIS has approximately 47,000 applications for permanent residence that are otherwise approvable, but for the fact that an FBI name check is pending. Under its new policy, CIS plans to approve such applications if the FBI name check request has been pending for more than 180 days and that application is otherwise approvable. CIS anticipates that by mid-March 2008 it will have decided most of the 47,000 cases. CIS has asked applicants to refrain from inquiring until after mid-March. This new policy does not impact naturalization applications which are delayed for the same (incomplete

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FBI name check) reason.

## EMPLOYMENT AUTHORIZATION DOCUMENT RENEWALS MAY NOT BE FILED TOO FAR IN ADVANCE

by Susan A. Smith, Esq.

U.S. Citizenship and Immigration Services (CIS) has changed its policy regarding when applications for renewal of Employment Authorization Documents (EADs) may be filed. CIS previously stated that an applicant could file for a renewal EAD 6 months in advance of the EAD expiration. CIS has now decided that "you cannot file for a renewal EAD more than 120 days before your original EAD expires." According to CIS, an I-765 application for a renewal EAD received after January 29, 2008, that was filed more than 120 days from the date of expiration, will be denied as having been filed too early.

## IMMIGRATION CONCERNS IN MERGERS AND ACQUISITIONS AND OTHER CORPORATE TRANSACTIONS

by Susan A. Smith, Esq.

Changes in corporate ownership through mergers, acquisitions (both stock and asset), IPO, or other corporate transaction can cause its nonimmigrant and immigrant employees to lose work authorization and subject the employer to serious I-9 (mandatory employment eligibility verification) compliance violations. In order to avoid the possibility of losing essential foreign employees and facing possible civil and criminal liability, companies should carefully consider the implications of the transaction on foreign workers and plan accordingly *before* the closing of a transaction. Advance planning will, in most cases, enable the employer to retain its key workforce and avoid liability.

We have outlined some issues for employers to consider when negotiating a corporate transaction and performing the due diligence process.

### Temporary Work Authorization of Foreign National Employees

In a corporate transaction involving foreign national employees, one of the first concerns should be whether or not such affected foreign national employee will be able to retain his or her work authorization. Most work visas are employer, job and location specific, so it is critical to evaluate how corporate changes due to the transaction will effect certain foreign national employees and to vet any possible issues before the closing of the transaction. Depending on the structure of the transaction, the new employer may be required to file new or amended petitions. If such petitions are not timely filed, the employee faces termination of work authorization and possible removal from the United States, while the employer can face possible civil and criminal liability.

### Foreign National Employees in the Permanent Resident Process

Like work visa cases, most employer-sponsored permanent residence cases are employer, job and location specific. If, due to a corporate transaction, the employer of a foreign national changes, the new company may be able to (and be required to) advance a "successor-in-

interest" argument (see below). In such cases, the employer must demonstrate that the new employer acquired the assets, liabilities, rights and obligations of the original employer and may be required to file new and/or amended documents. If the employer is not a successor-in-interest for immigration purposes, the new employer will likely be required to start the process again, which can be costly and time consuming.

### Successor-In-Interest

In some corporate transactions, the new employer may qualify as a successor-in-interest (if it has assumed all of the seller's immigration related assets and obligations) to the prior employer, which will preserve many permanent resident processes and could reduce filing obligations and filing fees for temporary work visas. In order to qualify as a successor-in-interest, the acquiring company should be made aware of successorship requirements and include necessary language in the deal documents before they are signed.

### I-9 compliance

In 1986 the Immigration Reform and Control Act ("IRCA") was passed to provide additional security measures to keep U.S. employers from hiring illegal immigrants. IRCA mandates that all U.S. employers are responsible to document that each employee hired after November 6, 1986 (including U.S. citizen employees) has proper employment authorization and that each employee's identity is consistent with their employment eligibility documents. Since 2006, the Department of Homeland Security has increased its enforcement of the IRCA and has increasingly been investigating possible violations. Therefore, it is vitally important that companies engaged in corporate transactions are especially diligent with regards to this issue. In instances where the employer can be considered a successor-in-interest, the employer should be extremely careful when reviewing the predecessor company's I-9 files as well as ensuring that the predecessor company responded to any "no match" letters issued by the Social Security Administration that indicate a discrepancy between the social security number and the database. If the new employer is not a successor-in-interest or simply wants added security, it will have to conduct a full, new I-9 process upon closing.

**If you're in need of any Immigration services please contact:**



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