September 2012 Immigration Alert

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I. DOS Issues October 2012 Visa Bulletin and Projects Future Demand for Immigrant Visas

The Department of State ("DOS") has issued its Visa Bulletin for October 2012. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration continue to show backlogs and regressions due to the heavy demand for these visas. On the employment-based side, the October 2012 Visa Bulletin showed that the Second

Preference ("EB-2") for China and India changed from "unavailable" to July 15, 2007, and September 1, 2004, respectively. The EB-2 cutoff date for the rest of the world advanced to January 1, 2012. In the October 2012 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: October 22, 2006, for all chargeability, including Mexico; February 8, 2006, for China; October 15, 2002, for India; and August 1, 2006, for the Philippines. The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

On August 30, 2012, the DOS's Visa Office discussed its predictions regarding the demand for employment-based immigrant visas for fiscal year ("FY") 2012 and FY 2013. Pertinent observations included:

A. First Preference ("EB-1"): Demand is unusually high. The visa classification could close briefly if this continues.

B. EB-2 Worldwide: Demand remains very high. It will not recover entirely in October 2012 but should become current later this year.

C. EB-2 India: This category is expected to advance slowly throughout the balance of 2012 and through 2013.

D. EB-2 China: This category may advance faster than EB-2 India but will continue to advance slowly.

E. EB-3 Worldwide: Steady but slow progress is anticipated for the rest of 2012 and 2013.

II. Congress Extends E-Verify as ICE Expands Worksite Enforcement Efforts

On September 13, 2012, Congress extended the E-Verify program for three additional years. E-Verify is the mostly voluntary program that allows registered users to electronically verify the name and work authorization of new hires against various government databases. Janet Napolitano, Secretary of the Department of Homeland Security ("DHS"), reported that Immigration Customs Enforcement ("ICE"), the agency within DHS that is responsible for worksite enforcement, has audited more than 6,000 employers and imposed over $76 million in fines and other financial sanctions since FY 2009. ICE has also prosecuted hundreds of employers for criminal violations of the immigration laws. Secretary Napolitano also reported that during FY 2012, ICE has issued more than 2,600 Form I-9 audit notices, criminally arrested 91 managers, and criminally charged an additional 220 employer representatives for violating laws relating to employment eligibility verification. During this same period, ICE recovered a record $36.6 million in fines, forfeitures, and restitutions.

III. NLRB Alleges Unfair Labor Practice for Unilaterally Implementing E-Verify

On August 31, 2012, the Regional Director of the National Labor Relations Board's ("NLRB") San Francisco, California Region, issued an unfair labor practice complaint, alleging that two Hyatt hotels in San Francisco violated Sections 8(a)(1) and (5) of the National Labor Relations

Act by unilaterally implementing E-Verify without negotiating with the union that represents the hotels employees. *Hyatt Regency San Francisco*, NLRB Reg'l Dir., No. 20-CA-084010 (complaint issued on Aug. 31, 2102).

The complaint was based on an unfair labor practice charge filed by UNITE HERE Local 2 ("Local 2"), which represents the hotel employees and is currently involved in a protracted and contentious negotiation with the hotels' operator for a new contract. The complaint results from the decision by the hotels to unilaterally implement E-Verify. Upon implementation of E-Verify, certain new employees were terminated when the system failed to confirm their legal right to work. Local 2 claims that the decision to implement E-Verify is a mandatory subject of bargaining and that the hotels lacked the legal right to take this action without first bargaining with this union. The NLRB complaint seeks an order directing the hotels to terminate their participation in E-Verify as well as reinstating, and making whole for lost wages, any employees terminated as a result of E-Verify.

A hearing on the complaint is now scheduled to take place before an administrative law judge on October 31, 2012.

IV. Congress Extends EB-5 Immigrant Investor Program, and USCIS Establishes a New Office to Oversee This Program

On September 13, 2012, Congress passed and sent to President Barack Obama an immigration bill that, among other things, extends the Employment-Based Fifth Preference ("EB-5") Immigrant Investor Program for an additional three years. The President is expected to sign this legislation.

Under the EB-5 program, investors can secure permanent residence in the United States if they invest $500,000 to $1 million in a commercial venture that creates at least 10 full-time jobs. On September 7, 2012, *The New York Times* reported how the EB-5 program is becoming a more popular source of financing for the hotel and hospitality industry. Other industries looking for an alternative source of relatively inexpensive financing also are considering the EB-5 program because its investors tend to be more interested in the immigration benefits than the risks or rate of return.

The EB-5 program has had a checkered history within the U.S. Citizenship and Immigration Services ("USCIS"). The administrative support for the program has never matched its entrepreneurial promise. As a result, the EB-5 program has not reached its potential. In July 2012, the USCIS announced that it plans to establish a separate and distinct office in the agency to oversee the administration of this program. According to USCIS Director Alejandro Mayorkas, this new office will be led by a chief of immigrant investor programs, who will have extensive experience in the business world and thus be better able to ensure that the program is administered efficiently and effectively.

The creation of this new office is the latest in a series of steps that the USCIS has taken to try and improve the EB-5 program and make it more attractive to foreign capital. Hopefully, the

action by Congress to extend the EB-5 program will spur even more action by the USCIS to better manage this program.

V. Congress Extends Conrad 30 J-1 Waiver Program

On September 13, 2012, Congress passed legislation that extended the Conrad 30 J-1 Waiver Program for an additional three years. The Conrad program provides a legal basis for foreign medical graduates ("FMGs") in U.S. residence programs to waive the foreign residence requirement that otherwise would require them to go home for at least two years at the end of their residency programs. Under the Conrad program, medically underserved communities in rural and inner-city areas are able to attract FMGs by supporting a waiver of their J-1 foreign residence requirement. Those organizations whose Conrad 30 waiver applications are approved can then secure H-1B status for the sponsored FMG and employ him or her in that status.

The Conrad program is limited. Each state may support only 30 FMGs for a Conrad 30 waiver annually. FMGs who are the beneficiaries of these waivers must agree to practice full-time in a medically underserved area for at least three years to secure waiver approval. After satisfying this commitment, the FMG is then eligible to apply for permanent residence if he or she otherwise qualifies for it.

VI. Second Circuit Strikes Citizenship Requirements for Professional Health Care Licenses

On July 10, 2012, the U.S. Court of Appeals for the Second Circuit found unconstitutional on equal-protection grounds a New York State regulation that required health care professionals to be American citizens or permanent residents to secure a professional license. *Paidi v. Mills*, No.10-4397 (2d Cir. July 10, 2012). The decision allows foreign nationals who are residing legally in this country as nonimmigrants, but who have not been admitted to permanent residence, to obtain a professional license. The Second Circuit found that the regulation's distinction between permanent residents and those foreign nationals in lawful nonimmigrant status was based on alienage and thus could not be justified under the applicable "strict scrutiny" test. The Second Circuit's decision conflicts with the U.S. Court of Appeals for the Fifth Circuit's decision in *Van Staden v. St. Martin*, 664 F.3d 56 (5th Cir. 2011), where the Fifth Circuit used a "rational basis" approach to uphold a Louisiana statute that required licensed practical nurses to be American citizens or lawful permanent residents.

VII. GAO's Welfare Ruling May Impact Immigration Rulemaking

On September 6, 2012, the U.S. Government Accounting Office ("GAO") ruled that the U.S. Department of Health and Human Services ("HHS") memo advising states to apply for waivers under the welfare program constitutes a rule under the Congressional Review Act ("CRA"), which requires that rules be submitted to both houses and the GAO before they can go into effect. In recent years, the executive branch increasingly has relied on agency guidance and policy statements to avoid the lengthy notice and comment process that formal rulemaking requires and to maintain agency flexibility and discretion in often rapidly changing

environments. The USCIS is one of the executive agencies that has made extensive use of such guidance and policy memos.

VIII. DACA Beneficiaries Are Not Covered by Affordable Care Act

In June 2012, President Obama announced that the federal government would not enforce the removal of young illegal immigrants if they: (a) came to the United States before they reached the age of 16; (b) are in school, have received high school diplomas, or served in the military; and (c) have not been convicted of a felony. Foreign nationals who satisfy these requirements are eligible for Deferred Action for Childhood Arrivals ("DACA"). Essentially, DACA is an act of prosecutorial discretion, where the executive branch has elected not to enforce the deportation of this group.

The creation of the class of DACA-eligible foreign nationals has raised a host of related issues. First, are DACA beneficiaries eligible for public benefits? The HHS determined on August 29, 2012, that they are not eligible to enroll in health insurance exchanges formed under the Patient Protection and Affordable Care Act ("PPACA"), receive tax credits for such coverage, join the Pre-Existing Condition Insurance Plan program, or sign up for Medicaid. According to the HHS, the executive order that established the DACA did not expand the definition of those who qualify as "lawfully present" and are thus eligible for Medicaid, the Children's Insurance Program, or other provisions of the PPACA. It is hard to square this analysis with HHS's positions in other program areas, such as the ones that allow Medicaid benefits to Persons Residing Under Color of Law (also known as "PRUCOL"). Litigation on this HHS rule can be expected.

Second, what are an employer's responsibilities if a DACA-eligible individual applies for employment or is hired? In this regard, the DHS has indicated that those individuals who receive a DACA designation are also eligible for employment authorization for the duration of the DACA designation. This means that they will receive an Employment Authorization Document ("EAD") that allows them to work for any employer and will have to complete a Form I-9 as required under the Immigration Reform and Control Act of 1986 ("IRCA").

Many other questions remain. For example, what if the employer learns that the DACA program has been discontinued while the EAD remains valid? What if the employer learns that the new employee may not have been eligible for the DACA designation in the first place? What if an existing employee asks the employer for documentation to establish eligibility under DACA and thus concedes that he or she has been working illegally? Will employers who fail to provide health insurance coverage have to pay the PPACA penalty even though these DACA employees may be ineligible for coverage under the exchanges? These and other questions will have to be addressed by employers on a consistent basis to avoid liability under either IRCA's worksite enforcement or anti-discrimination provisions. Stay tuned!

IX. New Developments in Immigration-Related Litigation

There have been several decisions issued recently in the immigration area. First, on August 20, 2012, the U.S. Court of Appeals for the Eleventh Circuit agreed with the federal government that most sections of Alabama's restrictive immigration law were unconstitutional on their face

because they were preempted by federal immigration law. *United States v. Alabama*, No. 11-14532 (11th Cir. Aug. 20, 2012). The Eleventh Circuit, however, did reject a facial constitutional challenge to a provision that makes it a crime for an illegal alien to obtain a business, commercial, or professional license, but it indicated that the government could raise the claim in the future if this provision was applied in a discriminatory manner. This result tracks how the Supreme Court of the United States handled the federal government's challenge to a similar Arizona statute that requires police officers to verify the immigration status of all foreign nationals whom they arrest if the officers have a reasonable suspicion that they are here illegally. See *Arizona v. United States* (U.S. Sup. Ct. June 25, 2012). There, the Supreme Court upheld the Arizona provision from a facial challenge but strongly hinted that it would re-visit the constitutional challenge if there was evidence that Arizona applied the statute in a discriminatory manner.

Second, the permissibility of discovery into the immigration status of workers was the subject of a recent decision in *EEOC v. Fair Oaks Dairy Farms LLC*, No. 2:11-cv-00265 (N.D. Ind. Aug. 1, 2012). There, the Equal Employment Opportunity Commission ("EEOC") brought an action against Fair Oaks Dairy Farms ("Dairy Farms"), alleging sexual harassment and back pay in violation of Title VII of the Civil Rights Act of 1964. During the course of the litigation, Dairy Farms sought discovery of documents evidencing the visa status of the workers that raised the discrimination claims. The district court granted the EEOC's motion for a protective order, concluding that "[i]migration status is not discoverable when it is relevant only to determine whether an employee can recover back pay in a Title VII claim." To hold otherwise, the district court opined, would interfere with the purpose of Title VII by chilling the filing of meritorious complaints. The district court did not address the relevancy of this information to claims of reinstatement and damages where the immigration status of the claimant may well be extremely relevant to the remedy sought by the EEOC.

Finally, the Superior Court of New Jersey, Appellate Division, issued a decision denying the application of a foreign national for unemployment insurance benefits. *Makutoff v. Board of Review*, Docket No. A-3444-10T3 (N.J. Sup. Ct., App. Div., July 23, 2012). In this case, the claimant had worked for Society General ("SG") in TN nonimmigrant status under the North American Free Trade Agreement. As a TN, he was eligible to work solely for SG until September 2009, and he remained in lawful TN status only as long as he actually was employed by that company. The claimant applied for unemployment after SG laid him off in October 2008, alleging that he was entitled to benefits through September 2009, when his TN expired. The superior court disagreed. To qualify for unemployment, the applicant must demonstrate, among other things, that he is able and available for work. In this case, the claimant's TN status expired when he was laid off, and he was not eligible to work for anyone else, or even remain in the country, once he was laid off. Under these circumstances, the superior court affirmed a lower court decision rejecting the claim for unemployment benefits for the requested period.

X. Sharp Reduction in New State Immigration Legislation Should Help Employers

As we predicted, the U.S. Supreme Court's decision that most of the restrictive Arizona immigration law was unconstitutional has had a chilling effect of the efforts of states to enact similarly restrictive legislation. The National Conference of State Legislatures has indicated that

the number of new immigration-related laws introduced in the various state legislatures has "dropped markedly." According to the report, this resulted primarily due to budget concerns about enforcing and then defending the statutes as well as concerns about how the Supreme Court would rule in the Arizona case.

The Supreme Court's decision in *United States v. Arizona* should define the parameters of acceptable state legislation. Thus, employers will still have to check both state and federal laws in each jurisdiction in which they operate. At the same time, recent efforts by some states to expand enforcement efforts over undocumented workers has largely been rejected by the Supreme Court, and this should make things easier for most businesses.

XI. CBP Discontinues Admission Stamps on Forms I-20/DS-2019 and Proposes Elimination of I-94 Record

On August 12, 2012, the U.S. Customs and Border Protection ("CBP"), the DHS agency that handles border admissions, announced that it would no longer provide admission stamps on Forms I-20 and DS-2019, and indicated that it would discontinue the use of the Form I-94 in the near future. The CBP suggested that these steps were being taken to further automate the admission process and lower the costs of that process, as part of the federal government's transformation from a paper-based to an online immigration environment.

On a related issue, the CBP recently announced that there may be delays of 30 days or more in inputting travel information into the government's I-94 database for foreign nationals entering the United States. This may cause problems for those who need the government to verify this information to secure employment (E-Verify), obtain a driver's license, apply for a Social Security Number ("SSN"), or even enroll children in school. Employers should factor this delay into their plans when hiring new foreign nationals, and develop accommodations because the obligation to pay an employee for work performed is not suspended even though he or she may lack an SSN.

The CBP's actions, however, may cause significant problems to foreign nationals who are legally in the United States but may now be unable to display the admission stamps or Form I-94 that many state and local officials require for proof of lawful status. This could lead to unwarranted arrests and delays in issuing driver's license or granting applications for benefits; create problems for employers trying to properly complete a Form I-9; delay the issuance of SSNs; and cause a myriad of problems for employers, government officials, and others that have historically relied on this documentation. We understand from the CBP that it currently will not place admission stamps on the Forms I-20 and DS-2019 and that there is no time line for elimination of the I-94 record. Our expectation is that this will be a slow process due to the ripple effect that the elimination of the I-94 might have.

XII. United States and Russia Negotiate New Visa Agreement

On August 29, 2012, the American Embassy in Moscow announced that the United States and Russia had reached an "historic" agreement to relax immigration restrictions between the two countries. Previously, Americans were limited to a 90-day stay within any 180-day period.

Starting September 9, 2012, however, Russian and American tourists and business travelers will be eligible to receive visas good for multiple entries during an expanded 36-month period. At the same time, the application fees for these visas will be significantly reduced and no exit visas will be required for Americans who lose their passports while in Russia. These new provisions are not self-executing. Americans will still be governed by the terms of the Russian visas in their passports until they secure new visas governed by these provisions.

XIII. DOS Issues Instructions for the 2014 Diversity Lottery Program

On September 18, 2012, the DOS issued its instructions for the annual Diversity Lottery program. Entries for the 2014 Diversity Lottery ("DV-2014") must be submitted electronically between noon, Eastern Daylight Time ("EDT"), on Tuesday, October 2, 2012, and noon, EDT, on Saturday, November 3, 2012. Paper entries will not be accepted. The DV-2014 instructions and application form are available on the DOS website (www.dvlottery.state.gov).

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For more information or questions regarding the above, please contact:

New York
Robert S. Groban, Jr.
212/351-4689
rgroban@ebglaw.com

New York
Pierre Georges Bonnefil
212/351-4687
pgbonnefil@ebglaw.com

Newark
Patrick G. Brady
973/639-8261
pbrady@ebglaw.com

San Francisco
Jang Im
415/398-3500
jim@ebglaw.com

Houston
Greta Ravitsky
713/300-3125
gravitsky@ebglaw.com