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BCIS, BCBP and BICE Name Change

Our U.S. immigration agency has changed its name yet again. As many members of the public are already aware, on March 1, 2003, immigration benefits services formerly provided by the Immigration and Naturalization Service (INS) transitioned into the Department of Homeland Security (DHS) under the Bureau of Citizenship & Immigration Services (BCIS), while several border and security agencies including the U.S. Customs Service, Federal Protective Service (FPS), and the border enforcement investigations functions of the former INS were transferred into the Directorate of Border and Transportation Security within the Department of Homeland Security. As part of this transition, these agency functions were reorganized into the Bureau of Immigration and Customs Enforcement (BICE), as well as the Bureau of Customs and Border Protection (BCBP).

In September 2003, Service Center Operations confirmed that "Bureau" has been dropped from what were formerly BCIS, BCBP and BICE, which now are known as USCIS, CBP and ICE.

H-1B Cap Reduced to 65,000

For Fiscal Year 2004, which began on October 1, 2003, the annual cap on H-1B visas reverted to 65,000. That number is a significant decrease from the 195,000 limit for fiscal year 2003. In addition, the USCIS (former INS) announced in August that during the first three quarters of 2003, 56,986 H-1B applications were approved and subject to the cap. An additional 47,813 are currently pending, and about one-third of them are expected to count against the cap if approved. In addition, petitions filed in the third quarter of fiscal year 2003 were up 15% over the same quarter of fiscal year 2002, and receipts through the first three quarters were up 3% over the same period last year.

Although it is uncertain exactly when the fiscal year 2004 cap will be reached, we can point to a number of variables that will affect that determination.

One variable is the number of cases pending at the beginning of the new fiscal year. The backlog of cases carried over from fiscal year 2003 could be significant and siphon numbers away from the decreased 65,000 cap.

Another factor is the free trade agreements with Chile and Singapore, which the President signed on September 3. The trade agreements contain provisions allowing the temporary entry of business professionals from Chile and Singapore to facilitate trade and services. Under the new program, nationals from Singapore and Chile are permitted to enter the United States under a new visa program called the H-1B1. The agreements permit the United States to impose rules similar to those contained in the current Labor Condition Applications of the H-1B program to ensure that employers will pay the prevailing wage and notify employees of the intent to hire foreign workers. The number of Chilean professionals allowed under the new program is limited to 1400, and the number of Singaporean professionals is limited to 5400. These numbers will count against the overall H-1B cap, and further reduce available H-1B visa numbers.

Fear of hitting the cap itself may drive many employers to file cases earlier than they otherwise would, which would result in the H-1B numbers being exhausted earlier in the year. Many employers may take advantage of the Premium Processing Program for this purpose. Under the Program, employers pay an additional \$1,000 for expeditious review (up to 15 days) of an H-1B petition by USCIS. Furthermore, as the economy recovers and employers begin to hire more workers, employers will likely choose to file more cases via Premium Processing.

As a result of the reduction of available H-1B visas due to the cap, including

current pending cases that will count against the 2004 cap, the recent Free Trade Agreements with Chile and Singapore, the Premium Process Program, and a recovering economy, the 2004 cap is likely to be hit relatively early in the fiscal year.

Although one cannot say with certainty when the cap will be reached, the dramatic reduction of available H-1B visas in the upcoming year is sure to put a strain on employers strengthening their work force. Employers should consider filing cases as early as possible in the fiscal year and planning ahead for upcoming staffing needs.

Diversity Visa Program

The Department of State has announced new regulations for applying for the Diversity Visa Program. Starting this year, all entries for the Diversity Visa Lottery must be submitted electronically in order to improve efficiency as well as to make the process less prone to fraud.

The registration period for the 2005 Diversity Visa Program is from Saturday, November 1, 2003, to Tuesday, December 30, 2003. A complete list of instructions has been issued by the U.S. Department of State (DOS), Visa Services. The full text of these instructions can be found on the DOS website at <http://www.travel.state.gov/dv2005.html>.

US-VISIT Program to Create Even Greater Delays

The U.S. DHS has made the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) one of its utmost priorities. The US-VISIT is the DHS' automated entry/exit system, which the DHS claims will expedite entry for legitimate travelers, and make it more difficult for individuals who intend to do harm to the U.S. to enter the country.

The system will be designed to collect, maintain and share information on foreign nationals, including biometric identifiers, to determine whether the individual: (i) should be prohibited from entering the U.S.; (ii) can receive, extend, change or adjust status; (iii) has overstayed his/her visa; and/or (iv) needs special protection/attention (*e.g.*, asylees). The system also is being designed to enhance traffic flow for individuals entering or exiting the U.S. for legitimate purposes.

It is expected that the US-VISIT system will be capable of capturing and reading a biometric identifier at air and sea ports of entry before the end of 2003. DHS anticipates that the new system will be able to scan travel documents and take fingerprints and photographs of foreign nationals, which will then be checked against databases to determine whether the individual should be detained or questioned about possible terrorist or criminal activities. Currently, the DHS is studying the use of fingerprints and photographs as well as other biometric identifiers, such as facial recognition and iris scan, as an integral part of the visa application process. However, at a minimum, the US-VISIT system will utilize existing fingerprint and photographic technology.

The US-VISIT system will be implemented incrementally, with an anticipated launch date of December 2003 for Boston Logan International Airport. Eventually, the system will collect information on the arrival and departure of most foreign nationals, including date, nationality, classification as an immigrant or nonimmigrant, complete name, date of birth, citizenship, gender, passport number and country of issuance, country of residence, U.S. visa number, date and place of issuance (where applicable), alien registration number (where applicable),

and complete address while in the U.S. Databases maintained by DHS and the State Department will store this information as part of an individual's travel record.

The fingerprints and photographs will be obtained from foreign nationals at the time of application for their visa stamp at a U.S. consular post abroad or at the border when they enter the U.S. The information on the US-VISIT system will be available to inspectors at the ports of entry to the U.S., special agents in the Immigration and Customs Enforcement (ICE) bureau, adjudications and staff at immigration services offices, U.S. consular offices, and other law enforcement agencies.

Because the gathering of these biometric identifiers will require individuals to personally appear at U.S. consular posts, the processing and issuance of new visa stamps may become significantly delayed during the initial implementation of this new process. In addition, individuals' entry to and exit from the U.S. may be delayed during the initial implementation of the system. We therefore advise individuals to be aware of these new procedures prior to planning any international trips.

Machine Readable Passports Required for Citizens of Some Countries in the Visa Waiver Program

The USA PATRIOT Act, passed by Congress in October 2001, contains a provision requiring all people who utilize the Visa Waiver Program to have a machine readable passport by October 1, 2003, in order to continue using the Program. The Program allows most European country citizens (and several others including Japan, Uruguay, New Zealand, Singapore, and Australia) to enter the U.S., as

either a Visitor for Business or Visitor for Pleasure, for a maximum of 90 days without obtaining or presenting a Visitor Visa stamped in the passport. Some countries whose citizens are eligible to enter the U.S. without a visa do not have machine readable passports. Others do not have passports with integrated biographic data that allows Immigration Officials to run the passport through an electronic reader and automatically search DHS databases.

The October 1 deadline has created significant concern for many business visitors, tourists and others who come to the U.S. for business meetings or other short trips. These individuals are experiencing difficulties because of the very long backlogs for obtaining the new machine readable passports in their countries and the equally long backlogs for obtaining a Visitor Visa at a U.S. Consulate. Additionally, the DOS and DHS fear that many foreign visitors who normally use the Visa Waiver Program may not even be aware of the October 1 deadline. If the DOS and DHS had adhered to the October 1 deadline, Immigration Officers would be forced to deny entry to Visa Waiver visitors without machine readable passports and require them to return immediately to their country.

The DOS recently announced that it was considering granting a one year extension (until October 26, 2004) of the deadline to those countries that specifically request this extension. The only country not eligible for the extension is Belgium because of an agreement that was previously finalized. As of the publication date of this Advisory the following countries have asked for and been granted extensions until October 26, 2004, to comply with the machine readable passport requirement: Australia, Austria, Denmark, Finland, France, Germany,

Iceland, Ireland, Italy, Japan, Monaco, Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Spain, Sweden, Switzerland, and the United Kingdom. The following countries decided not to request an extension because they felt most of their citizens already had machine readable passports: Andorra, Brunei, Liechtenstein, Luxembourg, and Slovenia. As of October 1, 2003, citizens of these five countries will need to present a machine readable passport at the airport/border or a U.S. visa.

If you have specific questions about who may need visas or machine readable passports, please contact one of the attorneys in our Immigration Section.

Visitors in F, M and J Classifications Will Not be Admitted to the U.S. Without the New Computer-Generated SEVIS I-20 Forms

Since August 1, 2003, all F and M classification students and J classification exchange visitors have been required to present the new computer-generated SEVIS (Student and Exchange Visitor Information System) Form I-20 (for F-1s and M-1s) or DS-2019 (J-1s) in order to be admitted to the U.S. SEVIS is an internet-based DHS information system that tracks key data on students and exchange program visitors in F, M and J status. This data includes arrival and departure information, as well as changes in programs and program completion dates. Students in possession of the old Form I-20 will generally be refused admission. Immigration officers may admit students whose programs have not yet complied with SEVIS requirements, and those students will be required to submit the new SEVIS I-20 (SEVIS DS-2019 for J-1s) within a period of 30 days from the date of entry.

Dependents in F-2, M-2 and J-2 will also be required to obtain SEVIS I-20s, and present them on admission.

It is important to note that since January 1, 2003, F-1 students have been required to apply for post program completion Optional Practical Training (commonly referred to as "OPT") prior to the completion of their programs. Under prior regulations, OPT could be applied for within 60 days after completion of the academic program. Failure to request OPT prior to program completion will result in denial of the application for employment authorization (form I-765). Also, when transferring to a different program, students must plan as far in advance as possible, as SEVIS requires lengthy correspondence between the two programs before the new school or program may issue a new I-20.

State Department Technology Alert List Resulting in More Visa Delays

The Immigration and Nationality Act renders inadmissible any person who seeks to enter the United States to violate U.S. laws prohibiting the

export of goods, technology or sensitive information. The U.S. Department of State maintains a "Technology Alert List" or "TAL" which lists categories of technologies thought to be too sensitive to allow their export from the United States. A nonimmigrant visa applicant seeking to enter the U.S. whose work relates to any of these listed technologies may face a delay in visa issuance. As might be expected, application of the TAL has increased in the wake of September 11th.

Recent guidance to Consular Officers in the field from the Visa Office in Washington attempts to clarify the use of the TAL in particular cases. If a Consular Officer determines that a visa applicant will be involved with one of the listed technologies, he or she is instructed to request a Security Advisory Opinion or "SAO" from the Visa Office for clearance. The visa can be issued only after the Visa Office gives its authorization. The guidance instructs Officers to request the SAO, or at least elevate the visa application to a more senior officer, if there is any doubt about the inclusion of a particular technology on the list. Unfortunately, the TAL lists technology categories so broadly that many

visa applicants may find themselves the subject of an SAO even if the specific technology area is not of great concern. Technology categories include those to be expected such as Conventional Munitions, Nuclear Technology, Rocket Systems, and Navigation Systems. However, broader categories include Chemical and Biotechnology Engineering, Advanced Computer/Microelectronic Technology, Materials Technology, Information Security, Robotics, and Urban Planning.

So far, Consular Posts in China appear to be applying the TAL with the most regularity, resulting in visa issuance delays of several weeks. If a U.S. employer and visa applicant are certain the technology in question is not covered by the TAL, the visa applicant should provide as much supporting documentation as possible explaining the employer's technology and the applicant's technological background. Having this information available at the time of the visa interview can help demonstrate to the Consular Officer that the technology is not covered by the TAL so that the TAL advisory opinion is not necessary. The Critical Fields List can be found on the Internet at <http://travel.state.gov/state147566.html>.

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