ALERTS AND UPDATES

EB-2 Visas for China and India Move Five Months and Other Immigration Law Updates

June 21, 2011

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July Visa Bulletin; EB-2 for China and India Move Five Months

After months without significant movement in the employment-based immigrant visa preference categories, the July 2011 *Visa Bulletin* announced a five-month jump for the EB-2 category for Indian and Chinese nationals. Those with priority dates on or before March 8, 2007, will be eligible to apply for adjustment of status—or an immigrant visa—beginning on July 1, 2011. If such an application has already been filed, these individuals will have their applications adjudicated and, if approved, will be granted lawful permanent resident ("green card") status. The EB-3 category moved incrementally for all nationalities.

Employment-Based Preference Category	All Chargeability Areas Except Those Listed	China—Mainland Born	India	Mexico	Philippines
EB-1	Current	Current	Current	Current	Current
EB-2	Current	March 8, 2007	March 8, 2007	Current	Current
EB-3	Oct. 8, 2005	July 1, 2004	May 1, 2002	July 1, 2005	Oct. 8, 2005
Other Workers	Nov. 22, 2004	April 22, 2003	May 1, 2002	Nov. 22, 2004	Nov. 22, 2004
EB-4	Current	Current	Current	Current	Current

Supreme Court Upholds Arizona's E-Verify Requirement

On May 26, 2011, the U.S. Supreme Court in *Chamber of Commerce v. Whiting*,[1] in a 5–3 decision, upheld the Legal Arizona Workers Act—a law that allows the state to revoke the business licenses of employers that knowingly hire illegal immigrants and requires employers in the state to use E-Verify. The Supreme Court held that Arizona's licensing law is not

preempted by the Immigration Reform and Control Act (IRCA); therefore, Arizona may require beneficiaries of state business licenses to use E-Verify, without running afoul of federal immigration law.

Chief Justice John Roberts, writing for the majority, said that the licensing portion of the Arizona law is not preempted by federal law because it falls under the IRCA's savings clause, which permits state "licensing and similar laws." The state law is a "licensing provision" that "fall[s] squarely within the federal statute's savings clause" and "does not otherwise conflict with federal law." The Court also found that the mandatory E-Verify requirement does not conflict with the federal government's employment verification scheme.

The Supreme Court's decision affirmed a U.S. Court of Appeals for the Ninth Circuit 2009 decision in *Chicanos por la Causa, Inc. v. Napolitano*[2]—that upheld the Arizona law, rejecting arguments brought by a coalition of business and immigrant rights groups—including the U.S. Chamber of Commerce, Arizona Employers for Immigration Reform and Chicanos por la Causa, Inc., that contended the law was both expressly and impliedly preempted by federal law. The Supreme Court rejected the Chamber of Commerce's argument that the state E-Verify mandate impedes the purpose of the federal government's voluntary employment verification program.

In a dissenting opinion, Justice Breyer joined by Justice Ginsburg maintained that the Arizona law does not fit within the IRCA savings clause because it would broaden the definition of "license" to include articles of incorporation and partnership certificates that are not employment-related licensing systems. Justice Breyer also said the E-Verify mandate was preempted because "by making mandatory that which federal law seeks to make voluntary," the Arizona law stands as an "obstacle" to the purposes and objectives set out by Congress. In a separate dissent, Justice Sonia Sotomayor said that the majority reading of the law "subjects employers to a patchwork of enforcement schemes similar to the one that Congress sought to displace when it enacted IRCA."

The decision did not address Arizona's S.B. 1070, the high-profile Arizona immigration law that requires police to check the immigration status of individuals in certain circumstances. The main provisions of S.B. 1070 were successfully challenged in federal court on constitutional grounds and are on appeal in the Ninth Circuit.

Now that the Supreme Court has appeared to give state E-Verify requirements the green light, it may be anticipated that many localities and states, particularly in the South, may promptly try to enact statutes similar to Arizona's. As discussed below, Alabama enacted a mandatory E-Verify requirement for all employers on June 9, and several bills similar to that upheld by the Supreme Court are pending in Pennsylvania. Based on its decision in *Whiting*, the Supreme Court has also remanded another long-running immigration preemption case challenging a local Pennsylvania ordinance with similar licensing provisions, described below.

Employers should be aware of the rapidly changing E-Verify landscape and should conduct periodic audits of sites in states, counties and cities with mandatory E-Verfiy requirements, to ensure compliance.

Supreme Court Remands Hazelton Immigration Law Challenge to Third Circuit

In light of its decision in *Chamber of Commerce v. Whiting*, the Supreme Court remanded *Hazleton, Pa. v. Lozano, Pedro, et al.*,[3] to the U.S. Court of Appeals for the Third Circuit for further consideration. This case originated in 2006 and concerns an ordinance passed by then-Mayor Lou Barletta of Hazleton, Pa. The ordinance targeted undocumented immigrants and penalized landlords who rented to them and employers who hired them. The ordinance was immediately challenged and in

2007 was blocked by a federal district court in Pennsylvania. The Third Circuit upheld the lower court's ruling, finding that the Hazleton ordinance was preempted by the federal government's exclusive jurisdiction to regulate immigration.

It is unknown at this time how the Third Circuit will apply the Supreme Court's decision in *Whiting* to the Hazleton law, which contains provisions that go far beyond business licensing requirements. Hazleton's law would not only suspend the licenses of employers, but also of landlords who rent property to undocumented immigrants. It also would prohibit businesses from recruiting, hiring, continuing to employ, permitting, dispatching or instructing anyone who is an "unlawful worker." The provision would prohibit "harboring," defined as "letting, leasing, or renting to an illegal alien" in "knowing or reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law." It also would make legal immigration status a "condition precedent" to entering into a valid lease, and deems as breached any lease with a person lacking lawful status. The Hazleton ordinance also provides for a private right of action for citizens to bring a complaint alleging that a local business or landlord is violating the law.

The *Hazleton* case warrants monitoring, as similar legislation has passed or is pending in numerous states and localities. Whatever the Third Circuit decides is likely to be challenged again in the Supreme Court.

Alabama Enacts Toughest State Immigration Law Yet

On June 9, 2011, Alabama Gov. Robert Bentley signed into law an immigration bill similar to Arizona's controversial S.B. 1070. The measure goes into effect on September 1, 2011. It prohibits transporting or housing undocumented immigrants, requires immigrants to carry evidence of lawful status and requires police to ask for legal documents if they have "reasonable suspicion" that someone is in the country illegally. The law mandates E-Verify for all Alabama employers and prohibits drivers from transporting undocumented immigrants. Similar provisions were included in Arizona's S.B. 1070, but they were enjoined by a federal judge earlier this year on a federal preemption theory.

The Alabama law also contains a novel provision: requiring public schools to check the citizenship status of their students. The measure does not prohibit illegal immigrants from attending public schools. Lawmakers said the purpose instead is to gather data on how many are enrolled and how the much the state is spending to educate them.

The Southern Poverty Law Center, the National Immigration Law Center and the American Civil Liberties Union announced that they will challenge the law in court. The U.S. Department of Justice has not commented, but is likely to join in any lawsuit opposing the law due to its position that immigration matters—such as those included in the Alabama law—are reserved for the federal government.

E-Verify Launches RIDE Program to Include Driver's License Verification; Starts with Mississippi

On June 13, 2011, U.S. Citizenship and Immigration Services (USCIS) launched the Records and Information from DMVs for E-Verify (RIDE) program. Once fully functional, the RIDE program will enable the E-Verify system to check driver's license information provided by employees against what is contained in state motor-vehicle records. Currently, Mississippi is the only state participating. At this time, 4,336 employers representing more than 9,000 worksites in Mississippi use E-Verify.

USCIS reports that more than 80 percent of employees present driver's licenses for I-9 completion; therefore, this tool may be beneficial in helping to improve E-Verify's accuracy and to combat document fraud. The agency's ultimate goal is to

extend this program to all state departments of motor vehicles (DMVs) nationwide. This is part of a strategic expansion reported in the Government Accountability Office's December 2010 report. Prior E-Verify, enhancements included the addition of U.S. passports to the photo-matching process in September 2010.

Employers should be aware that full implementation of RIDE will likely lead to a large increase in tentative nonconfirmations due to discrepancies and errors in state motor-vehicle databases.

Five E-Verify Bills Pending in Pennsylvania Legislature

Several pieces of E-Verify legislation are working their way through the Pennsylvania Legislature in Harrisburg. On May 24, 2011, the Pennsylvania Senate passed S.B. 637 (42–7). This bill requires public-works contractors and subcontractors to verify the work authorization of existing employees through the Social Security Number Verification System (SSNVS) and to begin using E-Verify for all new hires 60 days after the bill's enactment. Sanctions for violation of the act include debarment from state contracting for a minimum of 90 days. The Pennsylvania House version, H.B. 379, is awaiting action by the House State Government Committee.

Similarly, H.B. 380—the Construction Industry Employment Verification Act—requires all employers involved in construction trades to verify the work authorization of existing employees through the SSNVS and to begin using E-Verify for all new hires by July 1, 2011. Employers will be required to file annual reports verifying compliance. Failure to comply may result in forfeiture of business licenses and revocation of articles of incorporation.

H.B. 858, known as the Fair Employment Act, would require each entity filing an initial or renewal business registration to provide an affidavit confirming that it has no undocumented workers on staff and that it has enrolled in and is actively using E-Verify. A first-time failure to comply with this requirement would result in suspension of the entity's business license until the affidavit is submitted. The sanction for a second or subsequent failure to comply is a minimum 20-day suspension of the business registration and reporting of the failure to the U.S. Department of Homeland Security.

In addition to legal sanctions, these bills provide for random audits and complaint-based investigations by state agencies. They also contain employment protections for whistleblowers and anti-immigration-related discrimination provisions to protect legal workers—all of which may lead to additional administrative and litigation concerns for employers.

Pennsylvania would have one of the most comprehensive E-Verify legislative programs in the United States if these bills were passed in combination with two other proposals: H.B. 379 and H.B. 355. H.B. 379 would make it unlawful for any Pennsylvania organization or individual, including attorneys, to "knowingly employ or permit the employment" of an undocumented worker; and H.B. 355 would mandate E-Verify for all state agencies and funding recipients. While many states have passed prospective E-Verify requirements, none have so far mandated the SSNVS requirement for existing workers, and none have singled out the construction industry.

USCIS Temporarily Suspends the Use of VIBE in the Processing of H-2A Agricultural Visa Petitions

On June 1, 2011, USCIS announced it was suspending temporarily the use of the Validation Instrument for Business Enterprises (VIBE) for the H-2A agricultural guest-worker program. VIBE relies on company information contained in the Dun & Bradstreet database. If this information does not match information provided by a petitioning employer, the immigration petition will be placed on hold until the records can be rectified. Usage of the tool has significantly slowed

processing of all types of business-based visa petitions, which has greatly impacted H-2A employers due to the time sensitivity of agricultural jobs, thus necessitating the temporary suspension. Employers contemplating filing of any type of visa petition may want to review company records in Dun & Bradstreet to ensure that they are correct and up-to-date.

For Further Information

If you have any questions about this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *Chamber of Commerce of the United States v. Whiting*, 179 L. Ed. 2d 1031 (U.S. 2011).
2. *Chicanos por la Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. Ariz. 2009).
3. *City of Hazleton v. Lozano*, 79 U.S.L.W. (U.S. 2011).