Dinsmore & Shohl LLP
ATTORNEYS

Immigration Insights (July 2010)

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Option for Employees Mired in the Employment Based Third (EB3) Backlog

An employer has successfully gained a labor certification application approval from the U.S. Department of Labor ("DOL") and a subsequent Employment Based Third (EB3) I-140 Immigrant Petition approval for a foreign national employee. The employee has filed a permanent resident application, but the application is going nowhere due to the huge quota backlogs in the EB3 category.

In August 2010, only those foreign nationals with an EB3 priority date of June 2004 or earlier can expect U.S. Citizenship and Immigration Services (CIS) to approve their pending I-485 permanent residence applications (with the wait for persons born in China and India being even longer). The priority date is established when the employer files the labor certification application with DOL.

A question these employers may ask is whether to begin a new PERM labor certification application that, if approved, will track to the Employment Based Second (EB2) category where the queues or backlogs of earlier-qualified applicants are shorter. The following considerations may help to navigate this issue.

- *Consider Whether a New, Materially Different Job Will Become Available to the Employee in the Future.* If the employee remains in the same position that was the subject of the initial labor certification application, then normally initiating an EB2 based PERM case proceeding will not be possible. If the job required less than the threshold required for EB2 classification (which is at least a master's degree or alternatively a bachelor's degree plus five years of progressive post-baccalaureate experience), then a new PERM application based on the same job as before normally would require the same qualifications. Stating a higher level of education and experience for the same job might trigger DOL scrutiny as to whether the new application contains material overstatements or misrepresentations.
- *Determine Whether the Employee Will be Able to Meet the New Skill Set Standards.* The employee must be able to prove that prior to the filing of this new (second) PERM case, he or she already met the higher quotient of education and experience required by the EB2 job.
- *Examine the Likely DOL Prevailing Wage.* The employer may not proceed with recruitment under a PERM case unless it agrees to pay the prevailing wage at the time when the employee becomes a permanent resident. The higher education and experience requirements for EB2 classification may trigger a higher required wage rate, so the employer should not forge ahead without knowing how DOL will classify the new job for wage purposes.
- *Determine the Impact on the Employer's Immigration Sponsorship Policy.* We recommend that every employer that sponsors an employee for permanent resident status have an immigration sponsorship policy in place and that the employer require the employee to sign an immigration sponsorship agreement based upon the policy before agreeing to start the permanent resident process. If the employer's policy does not cover filing a second case, then the employer might consider amending its policy to address what it will do in such situations. At the very least, the employer should require the employee to sign a new agreement BEFORE starting the second permanent resident process. The employer should state that it has agreed to proceed with a second case but may decide in its sole discretion to end such a process at any time for any reason.

- *Retaining the EB3 Priority Date.* If, all going well, the employer later secures a PERM approval and files an EB2 I-140 immigrant petition, the employer can request CIS to transplant the earlier EB3 priority date into the EB2 Immigrant Petition.

U.S. Embassy and Consulates in China Accepting Appointments from Non-Immigrant Visa Applicants Regardless of Place of Residence

Effective immediately, non-immigrant visa applicants may book nonimmigrant visa interview appointments at any U.S. consular section in China, regardless of the province or city where they reside. The U.S. Department of State hopes that the elimination of geographic restrictions on visa applications will make the visa application process simpler and more convenient in addition to increasing the mutual understanding between the United States and China through people to people exchange.

What Questions Can I Ask Foreign National Job Applicants?

Employers often wonder what questions they may ask of foreign national job candidates that will allow employers to confirm the candidate's authorization to work while not at the same time exposing themselves to a claim of unlawful discrimination. The Immigration Reform and Control Act of 1986 (IRCA) protects foreign nationals from two types of discrimination: (1) citizenship discrimination; and (2) national origin discrimination. Only U.S. citizens, permanent residents, temporary residents, asylees, refugees, and conditional permanent residents (the "protected class") are protected from citizenship discrimination, while U.S. citizens, permanent residents and, all work authorized foreign nationals are protected against national origin discrimination.

It is not illegal to ask questions about immigration status, nor is it illegal for employers to refuse to hire a foreign national who requires work visa or immigration sponsorship. However, because it is illegal to discriminate against the protected classes defined in IRCA, employers may have legitimate concerns about asking questions relating to immigration status, which may lead rejected candidates to perceive that they were discriminated against and to file a discrimination claim with the U.S. Department of Justice. The Office of Special Counsel for Immigration-Related Employment Practices (OSC) has historically allowed only the following two questions to be considered "safe" and non-discriminatory:

1. Are you legally authorized to work in the United States?
2. Will you now or in the future require sponsorship for employment visa status?

Some employers have found these questions to be inadequate in determining whether a job applicant requires sponsorship and, in certain situations depending on their status in the U.S., job applicants have misinterpreted the questions. However, the OSC has recently stated that the following detailed question would not trigger citizenship status discrimination:

For purposes of the following question, "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status and 'job flexibility benefits' (also known as I-140 portability or adjustment of status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer." (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification).

QUESTION: Will you now or in the future require sponsorship for an immigration-related employment benefit

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H-1B Category is Still Open

U.S. Citizenship and Immigration Services (CIS) released the latest numbers relating to the volume of H-1B specialty occupation professional visa petitions that it has received requesting approvals during the H-1B Fiscal Year (FY) 2011 cap season. Petitions must request a starting employment date of October 1, 2010 or later.

	Annual Limit	Petitions Filed as of July 23, 2010
"Regular" Cap-Subject	65,000	26,000
U.S. Graduate Degree Exemption	20,000	11,300

Employers commonly use the H-1B category to hire professionals who have unique skill sets or education in hard to find niches including but not limited to sectors of the scientific, engineering, computer science, finance, or marketing fields. H-1B extension petitions are not subject to the H-1B cap, and some employers, such as colleges and universities, are exempt from the H-1B annual limits entirely.

August 2010 Visa Bulletin -- EB-2 and EB-3 Categories Advance

The U.S. State Department (DOS)'s August Visa Bulletin reflects some movement in the permanent resident or "green card" Employment Second Preference (EB2) and Third Preference (EB3) categories. The EB2 "all chargeability" category remains current, the cutoff date for EB2 India advances five months to March 1, 2006, and the cutoff date for EB2 China advances 13 weeks to March 1, 2006. The EB3 all-chargeability advances 9½ months to June 1, 2004, and EB3 China advances five weeks to September 22, 2003. The cutoff date for EB-3 India advances five weeks to January 1, 2002. The Employment First Preference category remains current across-the-board.

National Guard to Support Law Enforcement Along the Southwest Border

The Obama administration announced that it will begin deploying 1,200 National Guard troops to the Southwest border beginning on August 1, 2010. This deployment comes as part of the administration's efforts to combat the transnational criminal organizations that smuggle weapons, cash, and people across the Southwest border. Homeland Security Secretary, Janet Napolitano, stated that the National Guard "will provide direct support to federal law enforcement officers and agents working in high-risk areas to disrupt criminal organizations seeking to move people and goods illegally across the Southwest border." In addition, the President has also requested $600 million in supplemental funds for enhanced border protection and law enforcement activities.

Changes to Payment Options at USCIS Offices

Cash will no longer be accepted at U.S. Citizenship and Immigration Services (CIS) domestic offices and U.S. territories effective October 1, 2010. CIS states that "eliminating the acceptance of cash will reduce...operating costs." CIS customers may pay using checks (including personal checks), money orders, and credit cards. Checks and money orders must be made payable to the U.S. Department of Homeland Security.