Immigration Monitor
Monthly Immigration Updates

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FROM THE EDITOR'S DESK

This is February, the second month of the year and also one of the busiest months after March and April. Well, as no points for guessing the reason. All the employers are getting ready for the H-1B filing season as USCIS will begin accepting H-1B petitions subject to the Fiscal Year 2011 cap on April 1, 2010. Cases are considered accepted on the date that the USCIS takes possession of the petition; not the date that the petition is postmarked. Although earlier in 2009, H-1B petitions were sluggish, the uptick in H-1B petitions increased dramatically from October to December last year suggesting that there is an improvement in the economy and that demand for H-1B workers is likely to continue into the next H-1B season.

If you are an employer considering petitioning for an H-1B employee in April 2010, Contact VisaPro immediately as it is always suggested to get started early as the H-1B visa cap is predicted to be used up much faster than in FY 2010.

USCIS memo is the talk of the town these days. On January 8, 2010, the United States Citizenship and Immigration Services (USCIS) issued a memorandum intended to clarify the meaning of the "employer-employee" relationship for H-1B visa purposes. While the January 8 memo does not change any of the basic requirements for H-1B classification, the clarifications provided means that USCIS will be taking a closer look at all H-1B petitions, both new employment and extension petitions. The memorandum clarifies such relationships, particularly as it pertains to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.

The memo was issued in response to ongoing confusion over what constitutes a valid employer-employee relationship in the H-1B context. This guidance will look familiar to any immigration attorney or H-1B employer who has received a request for additional evidence (RFE) in the

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recent past. The guidance reflects the substance of those RFE's requiring proof the work is to be performed for the employer and requesting details on any on-site work with a third party.

USCIS, in deciding whether an H-1B employer – employee relationship is valid, focuses on the issue of control. USCIS must be satisfied the H-1B employer has a sufficient level of control over the H-1B employee. To satisfy USCIS, the H-1B employer must be able to establish that it has actual control of (or the right to control) when, where, and how the H-1B worker performs the job.

The following table shows the types of jobs that meet the employer – employee relationship and vice versa:

Valid Employer – Employee Relationship

1. Traditional Employment [Full time/Direct Employment]
2. Temporary/Occasional Off-Site Employment
3. Long-Term/Permanent Off-Site Employment
4. Long Term Placement at a Third-Party Work Site

Invalid Employer – Employee Relationship

1. Independent Contractors
2. Self Employed Beneficiaries
3. Third-Party Placement – "Job-Shop"

Thus, if you are an H-1B worker in search of new work, especially in the IT sector, you must scrutinize the relationship with your prospective H-1B employer to make sure the proposed employment relationship is acceptable under USCIS criteria. If you don't do so, you risk being denied an H-1B visa or change of status. In particular, if your H-1B employer will place you at client worksites to perform your job, you may not qualify for H-1B status.

We have addressed several of the main points of the memo through a "Question and Answer" format in this month's **In Focus** article.

Other Developments in Immigration Law

DOL Secretary Hilda L. Solis Announces Final Rule for H-2A Program

U.S. Secretary of Labor Hilda L. Solis today announced a new rule regarding the H-2A program. The Labor Department published in the Feb. 12 edition of the Federal

YOUR OPINION

Will proving the valid employer-employee relationship for H-1B visas be a cause of worry for the U.S. employers?

a. Yes

b. No

c. Can't say

Cast Your Vote

View Results

IMMIGRATION QUIZ

Win a FREE Online Consultation!

Submit your answer to the query below. The best response will be published in the next **Immigration Monitor** and the winner will receive a ***FREE Online Consultation*** from an Experienced VisaPro Immigration Attorney during the month of February 2010.

I am a citizen of Canada and I am working as an Independent contractor (providing software services) to a U.S. Company. Initially I used to travel to the U.S. on B-1 but now I want to be full-time in the U.S. So how should I go about filing an H-1B visa for myself as an independent contractor?

Submit Your Answer

Register, a final rule governing the labor certification process and enforcement mechanisms for the H-2A temporary agricultural worker program. The final rule is being published to strengthen worker protections for both U.S. and foreign workers and to ensure overall H-2A program integrity. The rule will be effective March 15, 2010.

USCIS to Issue Revised Approval Notices for Certain Forms I-129 and I-539

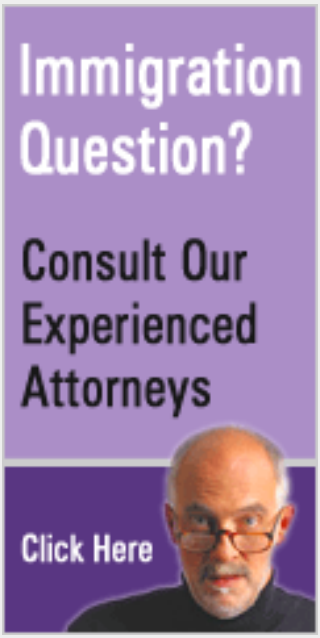
USCIS is alerting customers of certain Notices of Approval (Forms I-797) issued between Jan. 20 and Jan. 27, 2010, with incorrect or missing information. The form types impacted are Petition for Nonimmigrant Worker (Form I-129) and Application to Extend/Change Nonimmigrant Status (Form I-539). USCIS has started mailing new approval notices with corrected information to affected I-129 petitioners and I-539 applicants. Petitioners and applicants who received incomplete or incorrect approval notices should not attempt to use them.

Immigration Articles and Other Fun Stuff

Now for the regulars – this month's **Immigration Article** entitled **The Form I-751 – Petition to Remove Conditions on Permanent Residence** is a must read if you are granted Conditional Residency in the U.S. through marriage to a U.S. Citizen. The article gives you a comprehensive guide on removing the conditions on your residency. Also check out our In Focus section for this month entitled **Staffing or Third-party Placement Consulting Companies May No Longer Qualify for H-1B Visas** where we have addressed several of the main points of the H-1B memo through a "Question and Answer" format.

Every month we introduce a new and interesting question for our opinion poll. Last month's poll results indicate that **52.94%** of the respondents believe that the USCIS will reach the H-1B Cap as soon as the filing period opens in April 2010. We appreciate that people take interest in the opinion question and cast their vote to give us their feedback. Keep it up! And continue to cast your vote to express **Your Opinion**.

We congratulate **Jhanvi Thakkar** for winning last month's **Immigration Quiz**. Again, we received a significant number of responses from our readers, who talked about various solutions to support their position, but **Jhanvi Thakkar** gave the correct answer and won free online consultation to discuss the concerned Immigration issues. So it's time to get ready



Winner of the Immigration Quiz - January 2009:

Jhanvi Thakkar

The Question:

I am a permanent resident of the U.S. I filed the I-130 for my wife and my son in February 2005 and it got approved in March 2006. The NVC has no visa number for this case yet. Can I apply for a V-1 and V-2 visas respectively for my wife and son?

The Winning Response:

Unfortunately, neither your wife nor your son qualify for V visas respectively because to qualify for V visas the I-130 petition must have been filed on or before December 21, 2000. Practically, the V visa is currently not available to spouses and minor children of Legal Permanent Residents who have applied after December 21, 2000.

for this month's quiz. If you know the correct answer your name might be featured in next month's newsletter. All the Best!!!

To ensure you receive your Immigration Newsletter, please add Immigration-Monitor@VisaPro.com to your address book or safe list.

See you next month with a lot more noise from the Immigration World!

Christine

RECENT IMMIGRATION EVENTS

VisaPro Attorney Mr. Thomas Joy at Bangalore

Consular Interview Mock Session

Seminar Attendees at Hyderabad

More

Jhanvi Thakkar receives a **FREE Online Consultation** from an Experienced VisaPro Immigration Attorney during the month of February 2010.

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- **Immigration Paralegal**

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LATEST NEWS XML

DOL Certifies Approx. 3,000 Workers in 17 States as Eligible to Apply for Trade Adjustment Assistance (TAA)

The U.S. Department of Labor (DOL) announced that approximately 3,000 workers from companies in 17 states — Alabama, Arkansas, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maine, Michigan, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas and Virginia — are eligible to apply for Trade Adjustment Assistance (TAA). Workers covered by these latest Trade Adjustment Assistance (TAA) certifications will be contacted by their respective states with instructions on how to apply for individual benefits and services.

USCIS Provides Additional Information Regarding the Employ American Workers Act (EAWA) to Employers Filing H-1B Petitions

USCIS today provides additional guidance regarding the Employ American Workers Act (EAWA) to employers seeking to file H-1B petitions. The EAWA was enacted to ensure that companies that receive funding under the Troubled Asset Relief Program (TARP) or section 13 of the Federal Reserve Act do not displace U.S. workers. Under this legislation, any company that has received covered funding and seeks to hire new H-1B workers is considered an “H-1B dependent employer.” An H-1B dependent employer must make additional statements to the U.S. Department of Labor (DOL) regarding the recruitment and non-displacement of U.S. workers when filing a Labor Condition Application (LCA).

USCIS to Reissue Advance Parole Documents

USCIS announced that it will reissue Advance Parole documents (Form I-512) in response to documents that were mailed to applicants with an incorrect issue date of January 5, 1990. All

affected documents have been identified and USCIS will automatically reissue documents to individuals who have received a document with the incorrect issue date.

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IN FOCUS XML

Staffing or Third-Party Placement Consulting Companies May No Longer Qualify for H-1B Visas

On January 8, 2010, the United States Citizenship and Immigration Services (USCIS) issued a memorandum intended to clarify the meaning of the “employer-employee” relationship for H-1B visas. The January 8 memo focuses in particular on the employer-employee relationship where beneficiaries are placed at third-party worksites, are independent contractors, or are self-employed. While the January 8 memo does not change any of the basic requirements for H-1B visa classification, the clarifications provided means that USCIS will be taking a closer look at all H-1B visa petitions, both new employment and extension petitions. The article will address several of the main points of the USCIS memorandum on H-1B visas through a "Question and Answer" format.

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IMMIGRATION ARTICLE XML

The Form I-751 - Petition to Remove Conditions on Permanent Residence

When a foreign national marries a US citizen they are allowed to apply for permanent resident status in the US but if the marriage is less than two years old, the foreign-born spouse will be given ‘Conditional Residency’. Conditional residence is given for two years. The statute requires that the parties to the marriage submit a joint petition, form I-751; Petition to Remove the Conditions on Residence within the 90-day period before the card expires. If you fail to timely file the Form I-751 within the 90-day period before your second anniversary, your conditional resident status will automatically be terminated, and the USCIS will order that removal proceedings be started against you. Thus, removal of the conditions on your Permanent Residence status should not be assumed to be an easy process. All you need is proper care and timely filing. Once your petition is approved, you will be granted a 10-year permanent resident card, which is certainly worth your efforts.

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DISCUSSION CORNER

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By Paul

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By Schwez

Social Security No for F1 holders...
By khai_kohokoho

More Discussions

QUESTIONS AND ANSWERS

Q1. My wife and I divorced while she was applying for her Green Card, then, after half year, we reconciled and remarried. In our recently filed DS-230 form (we are applying for consular processing), we did not put the information about this divorce & remarriage incident. How serious this may impact our application? What is the best option I have right now?

Ans. You need to file a corrected DS-230 with the consulate to correct the information. The fact that you were divorced and remarried will not keep you from getting your Green Card as a derivative of your wife. The critical point is that you are married at the time your wife was granted her immigrant visa.

While the divorce and remarriage will not keep you from getting your immigrant visa with your wife it may raise some questions with the consular officer that will interview you. You should be ready to answer questions about why you separated and how you reconciled and remarried. You should take evidence with you to the interview to show that you have a valid marriage and that you did not remarry just for you to get a green card.

GOT A QUESTION?

If you have a short, simple query on immigration to the U.S., send your questions to us. We will select and answer a few of the queries in every issue.

Note: Responses posted in this section provide only general information. Since immigration law is a complex matter, please consult an immigration attorney before acting upon any responses provided.

Ask Your Question

Q2. I am a Canadian national and I own an Inc company in Hawaii. I did $400,000 gross last year with 4 employees, on track for 1.2 mill gross this year and 10 employees and 2 contractors. In order for me to grow the business to where I want it I need to be 100% involved. I do have a manager, but his abilities are limited and I have the experience to acquire new contracts and grow the company. I've originally invested in moving my new employees to Hawaii, equipment and operating costs. The company currently is self sufficient with 80-90,000 in the bank, and all equipment paid for (+/- $60,000). What will be the appropriate visa options for me – do I qualify for E-2 visa?

Ans. Yes, you do qualify for an E-2 visa and the investment meets the substantial investment test, and the U.S. Company with the 4+ employees will meet the marginality test. You would make your application to the U.S. consulate in Canada (as Canada is your home country) that handles E visa applications, either Toronto or Vancouver. Generally the process takes about 12 to 16 weeks and once the visa is issued you and your family would be able to relocate to Hawaii.

Another option that appears to be available to you is the L-1. As long as you keep the Canadian company running you would be able to transfer to the U.S. Company as an executive or manager. The L-1 is good for up to 7 years, and is generally faster to get (especially if you use premium processing) than the E-2 visa. The whole process may take about 6 weeks if you have all the documents.

You can also seek permanent residence as an executive or manager for the US Company if you arrive on an L-1 visa. The requirements are basically the same as for the L-1 visa. Again, the Canadian company has to remain in operation throughout the time you are processing your immigrant visa to meet the "multinational" requirement.

More Q&A

SUCCESS STORIES

*"Thank you for all your efforts in helping us acquire our **permanent resident** status in easy and quick manner. We appreciate [VisaPro] attorney's consultation that made such a huge difference in our case. We want to thank attorney who handled our case very successfully*

*We appreciate VisaPro's efficient and effective services in helping us acquire our **Green Card**. Despite being citizens of India, through the attorney's expertise we were able to get our permanent status in less than three months using cross changeability. I would recommend them to anybody for their excellent and expert knowledgeable staff and services."*

Murtuza Kothawala,
United States

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