May 2012 GCILC Immigration Newsletter

Please find below a copy of the May edition of the Immigration Newsletter published by the Gulf Coast Immigration Law Center (GCILC). The May 2012 GCILC Immigration Newsletter includes:

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Arizona v. *United States*

United States Supreme Court heard oral arguments on the Arizona immigration law SB 1070, addressing federal preemption and issues of determining of immigration status on "reasonable suspicion" and criminal penalties on unauthorized employees.

The only question before the Justices was whether federal immigration laws "preempt" the following four provisions of SB 1070 that were blocked by lower courts:

- **Section 2(B)** requires state and local police officers to attempt to determine the immigration status of any person lawfully stopped if "reasonable suspicion" exists that the person is unlawfully present in the United States. This section also requires state and local authorities to determine the immigration status of any person placed under arrest, regardless of whether the person is suspected of being in the country unlawfully.

- **Section 3** makes it a crime under Arizona law for unauthorized immigrants to violate the provisions of federal law requiring them to apply for "registration" with the federal government and to carry a registration card if one has been issued to them.

- **Section 5(C)** makes it a crime under Arizona law for immigrants who are not authorized to work in the United States to apply for work, solicit work in a public place, or perform work within the state's borders.

- **Section 6** authorizes state and local police officers to arrest immigrants without a warrant where "probable cause" exists that they committed a public offense making them removable from the United States.

Many provisions of Arizona's law are similar to those enacted in Alabama, Georgia, Indiana, South Carolina, and Utah. These states also enacted provisions requiring police officers to investigate the immigration status of all persons they stop/arrest if "reasonable suspicion" exists that they are in the country illegally. If the Court rules against all or parts of SB 1070, those provisions will remain legally enjoined, and any identical provisions in other states will also be prevented from taking effect.

However, the Supreme Court decision will not resolve all of the questions surrounding other state copycat laws. For those state laws that have evolved beyond SB1070 and are not identical to the provisions of SB 1070, lower courts will have to decide if and how the Supreme Court's decision applies. State legislatures may also try to amend their laws to conform to the Supreme Court's decision. For example, unlike SB 1070, Alabama's HB 56 requires school administrators to determine the immigration status of newly enrolling students.

The Justices' line of questions made clear that even if part or all of the Arizona law is not preempted by federal statutes, it may be impossible to apply in practice without violating individuals' constitutional rights.

Click here for the Transcript of 4/25/12 oral arguments.

Immigrants' Right to Timely Advisals

The Board of Immigration Appeals (BIA) ruled in *Matter of E-R-M-F- & A-S-M-*, 25 I&N Dec. 580 (BIA 2011) that immigrants who are arrested without a warrant do not need to receive certain Miranda-like warnings before being interrogated, while under federal regulations immigration officers must advise such noncitizens of the reason for their arrest, of their right to legal representation, and that anything they say may be used against them in a subsequent proceeding. The ruling is being challenged by five organizations, including the American Immigration Lawyers Association, which signed onto the brief.

Temporary Injunction of the 2012 H-2B Final Rule

The District Court issued an order granting Plaintiffs' preliminary injunction and enjoining the Department of Labor (DOL) from enforcing the 2012 H-2B final rule, which was scheduled to go into effect on April 27, 2012. A group of businesses and a business association filed a lawsuit in the Northern District of Florida challenging the DOL's Final Rule on Non-Agricultural Employment of H-2B Aliens when DOL published a Final Rule amending its regulations governing the certification of employment of nonimmigrant workers in temporary or seasonal nonagricultural employment and the enforcement obligations applicable to employers of H-2B workers and U.S. workers similarly employed.

Stateside Waiver (Provisional Unlawful Presence Waiver) Update

The U.S. Citizenship and Immigration Services (USCIS) published a proposed rule in the Federal Register which would reduce the time U.S. citizens are separated from their immediate relatives who must consular process and file a waiver for unlawful presence. The proposal would permit the immediate family of U.S. citizens to apply for a provisional waiver of unlawful presence while remaining in the U.S., thereby minimizing the time they would be separated from their families during the process. To obtain the waiver, applicants would still need to meet the strict letter of the law which requires them to prove that family separation will cause their American citizen spouse or parent extreme hardship.

If the waiver is granted, the foreign national must leave the U.S. and apply for and receive an immigrant visa abroad before returning to the U.S. The change will give countless American families a chance to stay together safely and legally.

Since the announcement of the proposed Provisional Unlawful Presence Waiver, there have been public misperceptions about the rule-making process and when the provisional unlawful presence waiver process will take effect. Please note the following:

- **The Provisional Unlawful Presence Waiver is NOT in effect.** The provisional unlawful presence waiver will not be available to potential applicants until an effective date is specified in the final rule USCIS will publish later this year in the Federal Register.
- USCIS cannot accept requests for a provisional waiver until the process change takes effect.
- **Beware of notarios, or other individuals who are not authorized to practice immigration law, who claim they can help you get a provisional waiver.**

Document Fraud in Employment Authorization & E-Verify Requirement

The Immigration and Nationality Act prohibits the hiring of individuals who are not authorized to work in the United States. It requires employers to check the immigration status of an employee and make sure that the identification document submitted by the employee "reasonably appears on its face to be genuine."

E-Verify is run by USCIS, in conjunction with the Social Security Administration (SSA) which is to provide employers with an accurate and easy way to determine employment eligibility. Through E-Verify, the Social Security numbers and alien identification numbers of new hires are checked against SSA and Department of Homeland Security (DHS) databases in order to help employers determine who is eligible to work in the U.S.

U.S. Immigration and Customs Enforcement (ICE) Statistics

- In fiscal year 2012 YTD, ICE removed over 102,000 individuals convicted of a crime.
- In fiscal year 2011, ICE removed 216,698 criminals, an 89 percent increase in the removal of criminals from fiscal year 2008.
- Overall, over 90 percent of all ICE removals in fiscal year 2011 fell into one of ICE's categories for priority enforcement.

China-Mainland Born and India EB-2 Cut-offs

The State Department (DOS) announced that no further EB-2 visas will be authorized for China-mainland born and India applicants with priority dates of August 15, 2007, or later. Foreign nationals may be eligible for an employment-based, second preference visa (EB-2) if they are members of the professions holding an advanced degree or its equivalent, or a foreign national who has exceptional ability.

Extension of Post-Completion Optional Practical Training (OPT) for Student Visa

USCIS updated the post-completion optional practical training (OPT) and F-1 status under cap-gap regulations that permit the automatic extension of F-1 student status for certain students with pending or approved H-1B petitions.

Current regulations allow certain students with pending or approved H-1B petitions to remain in F-1 status during the period of time when an F-1 student's status and work authorization would otherwise expire through the start date of their approved H-1B employment period.

FY2013 H-1B Cap Count

As of April 20, 2012, approximately 25,000 H-1B cap-subject petitions were receipted. Additionally, USCIS has receipted 10,900 H-1B petitions for aliens with advanced degrees.

U.S. businesses use the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. Some petitions are subject to the 65,000 H-1B numerical limitation (the "cap") and some petitions are exempt from the cap under the advanced degree exemption provided to the first 20,000 petitions filed for a beneficiary who has obtained a U.S. master's degree or higher.

Immigration Rules You Might Be Subject to (2)

The following are examples of persons who are subject to the grounds of inadmissibility under INA §212:

- Noncitizens who entered without inspection (EWIs)
- All noncitizens seeking admission to the United States at the border, either temporarily or as lawful permanent residents (LPRs)
- Persons physically in the United States who are seeking to adjust their status to lawful permanent residency
- LPRs returning from a trip abroad considered to be seeking admission under INA §101(13)(C), including those who have committed criminal offenses that would make them inadmissible under INA §212(a)(2)
- Aliens paroled into the United States

May 2012 Visa Bulletin

DOS has released its May 2012 Visa Bulletin. The Visa Bulletin sets out per country priority date cutoffs that regulate the flow of adjustment of status (AOS) and consular immigrant visa applications. Foreign nationals may file applications to adjust their status to that of permanent resident, or to obtain approval of an immigrant visa application at an American embassy or consulate abroad, provided that their priority dates are prior to the cutoff dates specified by the DOS.

Priority date cutoffs are assessed on a monthly basis by the DOS, based on anticipated demand. Cutoff dates can move forward or backward, or remain static and unchanged. Employers and employees should take the immigrant visa backlogs into account in their long-term planning, and take measures to mitigate their effects.

FAMILY SPONSORED CATEGORIES					
Family-Sponsored	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
F1	01MAY05	01MAY05	01MAY05	15MAY93	01JUL97
F2A	15NOV09	15NOV09	15NOV09	15OCT09	15NOV09
F2B	22FEB04	22FEB04	22FEB04	01DEC92	08DEC01
F3	08MAR02	08MAR02	08MAR02	15JAN93	22JUL92
F4	01DEC00	22NOV00	01DEC00	01JUN96	08JAN89

*NOTE: For March, F2A numbers **EXEMPT from per-count**

First (F1): Unmarried Sons and Daughters of U.S. Citizens: 23,400 plus any numbers not required for fourth preference.
Second: Spouses and Children, and Unmarried Sons and Daughters of Permanent Residents: 114,200, plus the number (if any) by which the worldwide family preference level exceeds 226,000, plus any unused first preference numbers:
A. (F2A) Spouses and Children of Permanent Residents: 77% of the overall second preference limitation, of which 75% are exempt from the per-country limit;
B. (F2B) Unmarried Sons and Daughters (21 years of age or older) of Permanent Residents: 23% of the overall second preference limitation.
Third (F3): Married Sons and Daughters of U.S. Citizens: 23,400, plus any numbers not required by first and second preferences.
Fourth (F4): Brothers and Sisters of Adult U.S. Citizens: 65,000, plus any numbers not required by first three preferences.

EMPLOYMENT BASED CATEGORIES					
Employment-Based	**All Chargeability Areas Except Those Listed**	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIPPINES**
1st	C	C	C	C	C
2nd	C	15AUG07	15AUG07	C	C
3rd	01MAY06	01APR05	08SEP02	01MAY06	01MAY06
Other Workers	01MAY06	22APR03	08SEP02	01MAY06	01MAY06
4th	C	C	C	C	C

Certain Religious Workers	C	C	C	C	C
5th Targeted Employment Areas/ Regional Centers and Pilot Programs	C	C	C	C	C

*Employment Third Preference Other Workers Category: Section 203(e) of the

First: Priority Workers: 28.6% of the worldwide employment-based preference level, plus any numbers not required for fourth and fifth preferences.
Second: Members of the Professions Holding Advanced Degrees or Persons of Exceptional Ability: 28.6% of the worldwide employment-based preference level, plus any numbers not required by first preference.
Third: Skilled Workers, Professionals, and Other Workers: 28.6% of the worldwide level, plus any numbers not required by first and second preferences, not more than 10,000 of which to "Other Workers".
Fourth: Certain Special Immigrants: 7.1% of the worldwide level.
Fifth: Employment Creation: 7.1% of the worldwide level, not less than 3,000 of which reserved for investors in a targeted rural or high-unemployment area, and 3,000 set aside for investors in regional centers by Sec. 610 of P.L. 102-395.

Click here for May 2012 Visa Bulletin in its entirety.

Immigration Processing Times

USCIS Service Center & District Office processing times online: Click here
Nonimmigrant Visa Waiting Times: Click here
Department of Labor processing times and information on backlogs: Click here

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