FOSTERQUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©

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1. IMPORTANT REVISIONS MADE BY USCIS TO KEY APPLICATION FORM

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1. IMPORTANT REVISIONS MADE BY USCIS TO I-129 (PETITION FOR A NONIMMIGRANT WORKER)

USCIS has revised the Form I-129, which employers use to petition for temporary workers in a variety of nonimmigrant visa classifications including H-1B, H-3, L-1 and O-1. The revised version of the form will be available on November 23, 2010 and will be mandatory to use on December 21, 2010. On November 23, 2010, the higher filing fees will also be required. (See Immigration Update of September 24, 2010). Below is a summary of the most important changes in Form I-129 and the supplements for the various nonimmigrant visa classifications.

Certification of compliance with U.S. Export Control Regulations

A new certification dealing with U.S. laws regarding export controls is added in Part 6 of Form 1-129. This certification only needs to be completed for H-1B, H-1B1 Chile/Singapore, L-1 and O-1A petitions. Under both the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR), release of controlled technology or technical data to foreign persons in the United States – even if by an employer – is deemed to be an export to that person's country or countries of nationality. One implication of this rule is that a U.S. company must seek and receive a license from the U.S. government before it releases controlled technology or technical data to its nonimmigrant workers employed in H-1B, H-1B1, L-1 or O-1A nonimmigrant visa status. The employer must certify on new Form I-129 hat it has reviewed the EAR and the ITAR and that it has determined whether an export license from the U.S. Department of Commerce or the U.S. Department of State is required. If the employer has determined that an export license is required, the employer must certify that it will prevent access to the controlled technology or technical data by the employee until and unless the employer has received the required license or other authorization to release it to the employee. To determine which technology and technical data are controlled for release to foreign persons, please review the EAR's Commerce Control List (http://www.gpo.gov/bis/ear/ear_data.html) and the ITAR's U.S. Munitions List (http://www.pmddtc.state.gov/regulations_laws/itar_official.html).

Off-site work location information required

The new Form I-129 asks whether the employee will work off-site. If the employee will be providing services at more than one location, the employer should include an itinerary with information

regarding the dates and places of assignment. More detailed questions regarding off-site assignments of H-1B employees are also added to the H Supplement.

New sworn statement for H-1B petitions

The H Supplement to new Form I-129 incorporates the following in the sworn statement signed by the employer:

- The employer certifies that it will maintain a valid employer-employee relationship with the employee at all times;
- The employer certifies that if the employee is assigned to a new location, it will obtain and post a Labor Condition Application for that site prior to reassignment; and
- The employer certifies that it cannot charge the employee the $1,500 American Competitiveness and Workforce Improvement Act (ACWIA) fee, and that any other required reimbursement will be considered an offset against wages and benefits paid relative to the Labor Condition Application.

Implementation of Public Law 111-230 filing fee for H-1B and L-1 petitions

Both the H Supplement for H-1B petitions and the L Supplement for L-1 petitions incorporate the new filing fee that is the result of a law signed by President Obama on August 13, 2010. If the employer employs 50 or more individuals in the U.S. *and* more than 50% of those employees are in H-1B or L nonimmigrant status, the employer must pay an additional $2,000 fee for each initial H-1B petition and an additional $2,250 fee for each initial L-1 petition. The new H-1B and L-1 filing fee does not apply to extension petitions.

New Release Statement signed by employer for USCIS audits and access to records

By signing Form I-129, the employer authorizes the release of any information of its records that USCIS needs to determine eligibility for the benefit being sought. Furthermore, the employer affirms that it recognizes the authority of USCIS to conduct audits of the petition using publicly available open source information. Finally, the employer recognizes that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.

J-1 and J-2 status question added

The new Form I-129 asks if the beneficiary has ever been a J-1 exchange visitor or J-2 dependent and if so, to provide the dates the beneficiary maintained status as a J-1 exchange visitor or J-2 dependent. This is to determine whether the beneficiary is subject to the 2 year return home requirement of INA § 212(e) which would require a waiver.

New category for H-1B cap-exempt employers

If the employer will employ the employee to perform job duties at (a) a cap-exempt institution of higher education; (b) a cap-exempt non-profit entity affiliated with an institution of higher education; or (c) a cap-exempt non-profit or governmental research organization, the employee will also be exempt from the H-1B cap.

Certification regarding return transportation costs for employees in O and P status

The O and P Supplement adds a sworn statement in which the employer certifies that it will be liable for the reasonable costs of return transportation of the employee abroad if the employee will be dismissed from employment by the employer before the end of authorized stay.

If you have any questions regarding the new Form I-129 or the new filing fees, please contact your FosterQuan immigration attorney.

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2. DECEMBER 2010 VISA BULLETIN SHOWS LITTLE CHANGE EXCEPT FOR EB-3 MEXICO

Each month the U.S. Department of State (DOS) publishes the Monthly Visa Bulletin, reporting current immigrant visa availability under the annual quota system for U.S. immigration. In the December 2010 Visa Bulletin, there was no forward movement in the EB-2 and EB-3 category for persons born in India. The visa numbers for the EB-2 and EB-3 categories for persons born in China moved forward by one week and two weeks respectively. The visa numbers for the EB-3 category for persons born in Mexico moved forward by more than one year from May 1, 2001 to July 1, 2002. The EB-3 category for all other countries of birth remains backlogged with only slight forward movement in immigrant visa availability under the December Visa Bulletin.

For more information on beginning the permanent residency process and establishing a priority date under the appropriate immigrant category for one or more foreign national employees, please contact your FosterQuan immigration attorney.