FOSTERQUAN, LLP
THE COMPREHENSIVE IMMIGRATION LAW FIRM

IMMIGRATION UPDATE©

December 28, 2010

This Immigration Update© from FosterQuan, LLP contains important information regarding the following:

1. U.S. CITIZENSHIP & IMMIGRATION SERVICES (CIS) SUSPENDS APPLICATION OF "DEEMED EXPORT" QUESTIONS ON NEW THE FORM I-129 UNTIL FEBRUARY 20, 2011
2. U.S. DEPARTMENT OF STATE (DOS) PROVIDES UPDATE ON IMMIGRANT VISA AVAILABILITY IN THE JANUARY 2011 VISA BULLETIN
3. INITIATE NEW H-1B PETITIONS AS SOON AS POSSIBLE BEFORE THE FY-2011 H-1B QUOTA IS REACHED
4. U.S. DEPARTMENT OF LABOR (DOL) ORDERS BACK PAY AND IMPOSES MONETARY PENALTIES FOR EMPLOYER VIOLATIONS OF H-1B WAGE ATTESTATIONS
5. U.S. SENATE VOTES AGAINST THE DREAM ACT

1. U.S. CITIZENSHIP & IMMIGRATION SERVICES SUSPENDS APPLICATION OF "DEEMED EXPORT" QUESTIONS ON THE NEW FORM I-129 UNTIL FEBRUARY 20, 2011

On December 22, 2010, U.S. Citizenship & Immigration Services (CIS) announced suspension of the deemed export questions on the new Form I-129 until February 20, 2011. The CIS acknowledged that the agency had received many questions regarding the "deemed export" questions and has made the decision to postpone application of the questions in order to afford employers and immigration counsel time to develop and implement internal procedures appropriate for ensuring accurate responses.

While employers are required to utilize the new Form I-129 as of December 23rd, the questions in Part 6 concerning deemed exports need not be answered until February 20, 2011. After this date, the new Form I-129 will require employers to provide an additional attestation with respect to the exposure of non-citizen employees to controlled technology when filing a nonimmigrant petition on Form I-129.

The new attestation requires employers to certify that:

(a) A license is not required for the exposure of technology to a foreign national beneficiary, ***or***
(b) A license is required but such exposure will not occur until the necessary license is obtained.

Violations of export control laws and/or false certifications may subject employers to both civil and criminal penalties. Employers who produce, own, or have access to technology covered by Export Administration Regulations (EAR) or the International Traffic in Arms

Regulations (ITAR), should contact their FosterQuan immigration attorney in advance of February 20, 2011, for additional information concerning the new Form I-129 and the internal procedures recommended for promoting compliance and ensuring informed and accurate completion of the required certification. As always, FosterQuan will continue to monitor changes in petition requirements and will make further information available in future Immigration Updates© and on our website at www.fosterquan.com.

2. U.S. DEPARTMENT OF STATE (DOS) PROVIDES UPDATE ON IMMIGRANT VISA AVAILABILITY IN THE JANUARY 2011 VISA BULLETIN

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. The January 2011 Visa Bulletin shows modest forward movement across many Employment-Based preference categories, including advances of 1-4 weeks in the Employment-Based, Third (EB-3) category for applicants born in India, China, the Dominican Republic, and the Philippines. EB-3 visa availability advanced most significantly for applicants born in Mexico, which has a new "cut-off date" of April 15, 2003, under the EB-3 and "Other Worker" categories.

The EB-2 preference category advanced two weeks for applicants born in China, remained the same for applicants born in India, and remained current for all other countries of birth. The EB-1, EB-4, and EB-5 preference categories remain open for all countries of birth.

The January 2010 Visa Bulletin records retrogression in visa availability for various family-based immigrant preference categories, including a 19-month retrogression under the F-2A category. The F-2A category includes spouses and children of U.S. Lawful Permanent Residents.

For more information on any of these immigrant visa classifications, or to initiate the permanent residency process and establish a priority date for a foreign national employee, contact your FosterQuan immigration attorney. Your FosterQuan immigration attorney will be able to assist you by developing a case-specific strategy for pursuit of permanent residency under an appropriate category for your company's employees. FosterQuan will continue to monitor changes in immigrant visa availability and will make further information available in future Immigration Updates© and on our website at www.fosterquan.com.

3. EMPLOYERS SHOULD INITIATE NEW H-1B PETITIONS AS SOON AS POSSIBLE BEFORE THE FY-2011 H-1B QUOTA IS REACHED

On December 21, 2010, U.S. Citizenship & Immigration Services (CIS) reported that, as of December 17, 2010, the CIS had received approximately 53,900 H-1B visa petitions which were subject to the FY-2011 (October 1, 2010 to September 30, 2011) quota.

Employers should act quickly to initiate new H-1B petitions before the H-1B quota is reached for the fiscal year. Once the quota is reached, no new H-1B petitions may be filed until April 1, 2011, requesting an October 1, 2011 H-1B start date.

Though the H-1B quota is not expected to be reached January or February, a minimum lead time of two weeks is required to prepare and file an H-1B petition. Before the H-1B petition can be filed, a Labor Condition Application (LCA) must be filed with the U.S. Department of Labor (DOL) and must be certified. The DOL currently takes approximately 5-7 business days to certify LCAs.

The most critical candidates for the H-1B petitioning process are those F-1 students who are employed pursuant to F-1 Optional Practical Training (OPT) Employment Authorization Document (EAD) cards which will expire before October 1, 2011. Failure to secure an FY-2011 H-1B number for these employees may result in a gap in employment authorization.

The H-1B quota does not apply to H-1B extension petitions. Most H-1B change-of-employer petitions are also exempt. For new petitions which are subject to the H-1B quota, employers are encouraged to contact their FosterQuan immigration attorney now to initiate the H-1B petitioning process. As always, FosterQuan will continue to monitor the availability of H-1B visa numbers and will make further information available in future Immigration Updates© and on our website at www.fosterquan.com.

4. U.S. DEPARTMENT OF LABOR (DOL) ORDERS BACK PAY AND IMPOSES MONETARY PENALTIES FOR EMPLOYER VIOLATIONS OF H-1B WAGE ATTESTATIONS

On December 7, 2010, the U.S. Department of Labor (DOL) Wage & Hour Division announced imposition of a monetary penalty in excess of $126,000 on the owner of Peri Software Solutions. The New Jersey-based company was also ordered to pay back pay in excess of $600,000.

The DOL imposed penalties after finding violations ranging from failure to post notice of the Labor Condition Application filing at all applicable worksites to failure to pay the required prevailing wage rate for “non-productive” time. Under H-1B regulations, H-1B employees who are “benched” still must be paid the required prevailing wage rate listed on the certified Labor Condition Application. Peri Software Solutions was also debarred from filing H-1B petitions for a period of one year.

H-1B compliance failures can result in the imposition of monetary and H-1B debarment penalties against both an employer and its owners. Because back pay awards also include interest on the wages withheld, significant violations may result in penalties far in excess of the wages initially withheld. Employers who have questions concerning an employer’s obligations under the H-1B program should contact their FosterQuan immigration counsel to ensure that all employment and payroll activity is in compliance with H-1B regulations.

5. U.S. SENATE VOTES AGAINST THE DREAM ACT

On December 18, 2010, the U.S. Senate voted against cloture on the DREAM Act, denying a floor vote to legislation which, if passed, would have afforded a pathway to legal

residence in the United States for certain undocumented students and military service personnel.

The Obama Administration criticized the Senate vote, while senators who had supported prior versions of the DREAM Act defended their current "no" votes by pointing to differences in the current and original bills. Some senators, notably Sen. Kay Bailey Hutchison (R-TX) objected to the broader terms of the latest version of the DREAM Act which was rejected by the Senate.

Many advocates have long considered the DREAM Act the "most likely to succeed" of all immigration reform measures. With its failure, prospects of broader immigration legislation have dimmed. Now that Republicans hold the majority in the U.S. House of Representatives and can utilize Senate filibuster rules to prevent legislation from reaching a floor vote without a super-majority of 60 votes in the U.S. Senate, vocal Republican opposition to immigration reform will make it difficult for Congress to pass any non-enforcement immigration legislation in the coming year.

As always, FosterQuan will continue to monitor immigration advocacy and legislative activity and will report significant developments in future Immigration Updates© and on our website at www.fosterquan.com.