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## **1. EB-2 DATES ADVANCE SUBSTANTIALY IN THE AUGUST 2010 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. In the August 2010 Visa Bulletin, there was substantial forward movement of four months in the EB-2 category for persons born in India, and moderate movement forward of one month for the Indian EB-3 category. The visa numbers for the EB-2 and EB-3 categories for persons born in China moved forward by three months and one month respectively.

The U.S. DOS continues to report temporary unavailability of immigrant visas under the Employment-Based, Third Preference (EB-3) and “Other Worker” categories for persons born in Mexico. Additionally, the EB-3 category for all countries of birth remains backlogged.

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.

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## **2. EMPLOYER PRE-HIRE QUESTIONS REGARDING IMMIGRATION STATUS OF APPLICANT – NEW GUIDANCE ISSUED BY OFFICE OF SPECIAL COUNSEL FOR IMMIGRATION-RELATED UNFAIR EMPLOYMENT PRACTICES (OSC)**

Recently, the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) issued guidance concerning pre-hire questions that assist employers who wish know whether an applicant requires sponsorship for work authorization. Previously, the OSC recommended as appropriate the following two questions for employers:

1. *Are you legally authorized to work in the United States?* \_\_ Yes \_\_ No
2. *Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?* \_\_ Y \_\_ N

Because of much misunderstanding associated with those individuals who hold valid Employment Authorization Documents (EAD), but who would still require action on the part of the new employer in obtaining longer term work authorization, the OSC has confirmed that the following question (with leading preamble) would be appropriate:

- *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.)*

*Will you now or in the future require “sponsorship for an immigration-related employment benefit?”* \_\_ Yes \_\_ No

For more information about the newly approved OSC language for questions on employment applications regarding immigration status, or to discuss potential changes to your new hire application forms and pre-screening questions, please contact your FosterQuan immigration attorney.

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### **3. FORM I-9 THREE-BUSINESS-DAY RULE - U.S. CITIZENSHIP & IMMIGRATION SERVICES (CIS) CLARIFIES EMPLOYEE HIRE DATE FOR I-9 AND E-VERIFY PURPOSES**

The CIS has provided an [update to their E-Verify and Form I-9 guidance](#) in an attempt to clarify the definition of a “hire date” and the time frame for employers to complete the Form I-9 and initiate the E-Verify process. The CIS has stated that employers are to complete the Form I-9 and create a case in E-verify no later than the third business day after the employee started work for pay. As a practical example, the CIS has provided the following scenario:

- *If the employee starts work for pay on Monday, the third business day after the employee started work for pay is Thursday (assuming all days were business days for the employer). The first day the employee starts work for pay is not included in the three business day calculation.*

**Under these new guidelines, the CIS appears to have extended the Form I-9 and E-Verify deadline by a full business day. Please note: Absent a change in CIS regulations, employers are encouraged to continue with the existing practice of completing the Form I-9 Employment Eligibility Verification process by the third day of work.**

Because the E-Verify system does not allow a future date to be selected as the hire date for cases in which the employer seeks to create a case in E-Verify before actual employment begins, the CIS has acknowledged that the term “hire date” in E-Verify can be confusing. A Form I-9 must be completed before an E-Verify case can be created, and the earliest that an employer may complete the Form I-9 is once the employee has accepted an offer of employment (Please note that the employee is not required to have begun employment in order for the Form I-9 to be completed and the E-Verify process to be initiated; however, the employee must have accepted an offer of employment) The CIS has provided guidance in cases where E-Verify is being completed before the employee has started to work for pay. In such situations the E-Verify hire date should be the date the case is created in E-Verify. If E-Verify is completed on, or after, the day the employee starts work for pay, then the appropriate E-Verify hire date is the actual date the employee began working for pay.

Given the above guidance from CIS, an E-Verify case is not late as long as it is created no later than the third business day after the employee started work for pay, without regard to the number of days that have passed following completion of the Form I-9.

Please contact your FosterQuan immigration attorney for all questions related to the completion and requirements for Forms I-9, E-Verify and Employment Eligibility Verification.

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#### **4. NON-IMMIGRANT VISA APPOINTMENTS MAY NOW BE BOOKED AT ANY CONSULATE IN CHINA**

Effective immediately, non-immigrant visa applicants may book interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang.

For more information on these changes in visa procedures and requirements, and to initiate new visa applications, contact your FosterQuan immigration attorney. Our experienced teams in FosterQuan’s Global Immigration practice group are ready to assist with your company’s global immigration needs.

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#### **5. H-1B VISAS STILL AVAILABLE - U.S. CITIZENSHIP & IMMIGRATION SERVICES (CIS) CONTINUES TO ACCEPT H-1B PETITIONS UNDER THE REGULAR H-1B CAP AND THE “MASTERS” CAP**

U.S. Citizenship & Immigration Services (CIS) announced that, as of July 9, 2010, the CIS had received approximately 24,800 H-1B petitions that were counted under the regular 65,000 H-1B cap, and approximately 10,600 H-1B petitions that were counted under the additional 20,000 “Masters” cap for Fiscal Year 2011.

H-1B usage continues to lag behind previous years, and it is expected that H-1B visas will remain available for a few more months. It is possible that a spike in H-1B filings could occur in July and August, following the Spring graduation dates, and again in December following Fall graduation dates, when additional F-1 students will meet the Bachelors degree requirement for H-1B petitions and will formally enter the job market.

### **Avoiding the “Cap Gap” in Employment Authorization**

Although H-1B numbers remain readily available, it is important to pursue H-1B petitions as soon as possible for any F-1 students who might otherwise experience a “gap” in employment authorization upon the expiration of their Optional Practical Training Employment Authorization Document (EAD) cards.

Students who have EAD cards that will expire during the summer will need to have an H-1B petition filed on their behalf prior to the expiration of their EAD cards in order to take advantage of the automatic “extension” of their employment authorization through October 1, 2010, the beginning of Fiscal Year 2011, and the first day of FY-2011 H-1B petition validity.

To initiate a new H-1B petition, or for assistance in evaluating other visa options for existing employees and new hire candidates, please contact your FosterQuan immigration attorney. As always, FosterQuan will continue to monitor H-1B visa availability and will make future information available via future Immigration Updates© as appropriate, and on our firm’s website at [www.fosterquan.com](http://www.fosterquan.com).