

# PUBLICATION

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## **Immigration Update: Online Resources for Same-Sex Spouse Immigration Benefits; F-2A and EB-2 Category Visas Opening; FLSA Decision in Favor of Undocumented Workers**

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**August 15, 2013**

Highlights this month include online resources for same-sex spouse immigration benefits, F-2A and EB-2 category Visas opening; and an FLSA decision in favor of undocumented workers.

### **Immigration Benefits for Same-Sex Spouses—Online Resources**

The Department of State, United States Citizenship and Immigration Services and the Social Security Administration have each posted timely and very useful FAQs to address issues following the Supreme Court's *Windsor v. United States* decision, which invalidated part of the Defense of Marriage Act. The impact of the case is to treat gay marriage the same as heterosexual marriage in all areas of immigration.

### **Significant Advances in Visa Numbers Open Doors to Permanent Residency in Two Categories**

The August 2013 Visa Bulletin published by the Department of State marks a major leap forward for available immigrant visa numbers for applicants in traditionally backlogged classifications. Now, individuals who are spouses or unmarried children of permanent residents (F2A) or citizens of India in the Employment-Based 2nd Preference category (EB2; Members of the Professions holding Advanced Degrees or Persons of Exceptional Ability) may finally be able to complete the remaining steps to become permanent residents. Up until this month, the F2A category had a cut-off date that remained around September or October 2011, and the category has now become "current." This means that immigrant visa numbers are immediately available to those applicants in this classification. The EB2 category for applicants from India has had a cut-off date of September 1, 2004 since October 2012, and has now advanced to January 1, 2008. Many Indian nationals with approved EB2 petitions (and priority dates on or before the cut-off date) can finally file their adjustment of status applications to become permanent residents.

### **Eight Circuit Decision Upholds FLSA Protection to Undocumented Workers**

The Eighth Circuit in *Elmer Lucas v. Jerusalem Café, LLC* (No. 12-2170, July 29, 2013) held that the Fair Labor Standards Act's (FLSA) overtime and minimum wage protections cover undocumented workers, and do not allow employers to exploit an employee's immigration status or profit from hiring unauthorized individuals. Although the Eleventh Circuit was the only other circuit court to directly address this precise question, the Secretary of Labor and numerous district courts in New York, Oklahoma, New Jersey, Michigan and California agree that employers who unlawfully hire unauthorized aliens must otherwise comply with federal employment laws. Comparing the employer's argument for exclusion to the flawed argument raised in 1931 to exempt Al Capone from paying taxes on illicit income, the Eight Circuit held that "aliens, authorized to work or not, may recover unpaid and underpaid wages under the FLSA."