

## WOLFSDORF IMMIGRATION NEWSLETTER AUGUST 2008

### 1. U.S. Customs and Border Protection Releases Electronic System for Travel Authorization (ESTA)

U.S. Customs and Border Protection has recently unveiled a new "Electronic System for Travel Authorization" (ESTA), participation in which will be mandatory for Visa Waiver Program visitors to the United States beginning on or about January 12, 2009 (although a voluntary pilot program began on August 1, 2008).

#### DO I HAVE TO REGISTER UNDER ESTA?

Under ESTA, all nationals and citizens of Visa Waiver Program countries who seek to enter the United States as visitors for temporary business or pleasure must acquire an electronic "approval" or clearance prior to boarding an air or sea carrier to the United States. Visa Waiver Program country nationals that already have valid U.S. visas (e.g. a professional work visa) will not be required to register or submit applications under ESTA so long as they are traveling to the United States to engage in activities authorized by that visa. Individuals from countries that are not part of the Visa Waiver Program do not have to register or submit applications under ESTA. As of August 5, 2008, the Visa Waiver countries whose nationals will be subject to mandatory ESTA registration in 2009 are: Andorra, Austria, Australia, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, The Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

#### HOW DO I REGISTER UNDER ESTA?

ESTA applications must be submitted via the Internet (at <https://esta.cbp.dhs.gov>) in English at least 72 hours prior to the applicant's travel, and will result instantly in a response of "Authorization Approved," "Authorization Pending" or "Travel Not Authorized." If approved, ESTA participants will no longer be required to fill out Form I-94W prior to entry to the United States, and this information will be electronically integrated into agency databases. ESTA approval will be valid for

multiple trips during a period of two years following approval or until expiration of the applicant's current passport, whichever occurs earlier. If authorization is pending, a final determination will be made and posted online within 72 hours. If travel is not authorized, the applicant must report to a U.S. Embassy or Consulate to apply for a visa.

The information collected online with each ESTA application will include biographical data and passport information, the destination address in the United States, the travel itinerary and several other questions previously elicited on the green Form I-94W. Although ESTA applications must be submitted at least 72 hours prior to travel, they may be submitted far in advance of travel according to the preference of each applicant. It is not required to have concrete dates or plans for travel at the time of applying under ESTA, and the destination address and travel itinerary information for each applicant can be updated later through the ESTA website.

At least during the initial stages of the program, there will be no fee for ESTA applications. ESTA travel authorization will not necessarily guarantee any individual's admission to the United States, and all travelers will remain subject to interview and inspection by U.S. Customs and Border Protection officers upon arrival.

#### SHOULD I PARTICIPATE IN ESTA'S VOLUNTARY PILOT PROGRAM PRIOR TO JANUARY 12, 2009?

Because of the brand new status of the ESTA system, it is difficult to anticipate the accuracy of ESTA application outcomes. Therefore, Wolfsdorf Immigration Law Group does not recommend nationals of Visa Waiver Program countries temporarily visiting the United States to use ESTA unless and until participation becomes mandatory on January 12, 2009.

#### 2. Bill Would Extend E-Verify for 10 Years

With E-Verify set to expire in November, some lawmakers feel there is insufficient time to do anything other than pass a 10-year extension. "We've got six weeks left in this session, and we're just not going to get that done," said Rep. Zoe Lofgren (D-Cal.). She and Rep. John Conyers (D-Mich.) are moving a bill for a 10-year extension through the House of Representatives. Any reform of the verification process will have to wait until the next administration.

#### 3. EB-2 Numbers for India, China Advances in August; Employment Third Preference Category Is Unavailable

The Department of State's Visa Bulletin for August notes that the employment-based second preference (EB-2) visa category for India and China advanced to June

1, 2006, a jump of more than two years. Meanwhile, Demand for visa numbers will result in the employment third preference "Other Worker" category reaching the annual fiscal year 2008 numerical limit. As a result, this category is unavailable beginning in August and will remain so for the remainder of FY 2008. This will be temporary, however, and the employment third preference cut-off date will return in October, the first month of the new fiscal year, to January 1, 2003. Other employment categories are not expected to move in August.

The Visa Bulletin is available at  
[http://travel.state.gov/visa/frvi/bulletin/bulletin\\_4310.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html).

#### 4. State Dept. Releases Annual Student and Exchange Visitor Update

The Department of State's Bureau of Consular Affairs has released the annual update of its student and exchange visitor (F, J, and J visas) issues. The cable asks posts to have a clear procedure in place for expediting F, M, and J appointments, with first-time applicants being given the highest priority. The cable also discusses summer work and travel issues, clarifies some information on Form DS-2019, and reminds posts about required annotations and the end of requirements to put DS-2019 forms in sealed envelopes. The cable also notes the changes in J-1 sponsor sanctions procedures.

The cable is available at  
[http://travel.state.gov/visa/laws/telegrams/telegrams\\_4202.html](http://travel.state.gov/visa/laws/telegrams/telegrams_4202.html).

#### 5. USCIS Adds Vaccines to Requirements for Permanent Residents

U.S. Citizenship and Immigration Services (USCIS) announced on July 24, 2008, a revised list of vaccines required for applicants seeking permanent resident status. This revision follows guidance from the Centers for Disease Control and Prevention (CDC).

CDC's revised *Technical Instructions to Civil Surgeons for Vaccination Requirements* require the following age-appropriate additional vaccinations to adjust status to legal permanent resident:

- Rotavirus
- Hepatitis A
- Meningococcal
- Human papillomavirus
- Zoster

The requirements for these new vaccines went into effect on July 1, 2008; however, CDC approved a 30-day grace period for any medical exam conducted before August 1, 2008. Starting on that date, the new vaccinations, if appropriate, must be administered in order for USCIS to approve the applicant for adjustment of status.

USCIS has revised the Report of Medical Examination and Vaccination Record (Form I-693) to include these new vaccination requirements. The June 5, 2008, edition of the I-693 must be used for any medical examination completed on or after August 1, 2008.

USCIS's notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=902252b10f45b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. The CDC's revised *Technical Instructions to Civil Surgeons for Vaccination Requirements* are available at <http://www.cdc.gov/ncidod/dq/civil.htm>. USCIS has posted a list of frequently asked questions about the revised vaccination requirements at <http://www.uscis.gov>.

#### 6. USCIS Updates Cap Info for H-1B Workers for FY 2009

U.S. Citizenship and Immigration Services (USCIS) recently noted that 6,800 visas are set aside during the fiscal year for the H-1B1 program under legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool can be made available for H-1B use with start dates beginning on October 1, 2008, the start of FY 2009. USCIS has added 5,800, the projected number of unused H-1B1 Chile/Singapore visas, to the FY 2009 H-1B cap. As of the update, the cap for H-1B1s for FY2009 had not been reached.

This and related updates are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=138b6138f898d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=91919c7755cb9010VgnVCM10000045f3d6a1RCRD>.

#### 7. New Exit Tax Provokes Concerns

The new "exit tax," under the Heroes Earnings Assistance and Relief Tax Act of 2008, applies only to U.S. citizens who expatriate and long-term (eight years or longer) permanent residents who lose their status (voluntarily or otherwise) on or after the date of enactment, which was June 17, 2008. The prior tax law continues to apply to U.S. citizens who expatriated and long-term residents who lost their permanent resident status before June 17. The new exit tax may prove to be a

major deterrent for wealthy individuals who are considering applying for permanent residence.

The Reed Amendment exclusion ground for U.S. citizens who expatriate to avoid U.S. tax was not repealed or modified (as proposed in some earlier versions of the exit tax). There are no regulations to implement it, however.

The full text of the bill is available at <http://www.opencongress.org/bill/110-h6081/text>.

#### 8. USCIS Proposes Modifying LCA, Seeks Comment on Labor Certs for Ag Workers

The Department of State seeks comment on the labor condition application (LCA) for H-1B, H-1B1, and E-3 nonimmigrants. The modifications being proposed to ETA Forms 9035, 9035CP, and 9035E are primarily due to the elimination of the "Fax Back" system and converting exclusively to the electronic submission system, except in rare cases of physical disability that prevents use of a computer. The Department noted that all three forms need to be updated to eliminate all reference to the "Fax Back" system and "provide more clarity to the user of the form, thereby obtaining more accurate information for the Department to assist in more efficient and effective adjudication of the requested benefit." The Department said the information collected remains the same. The *Federal Register* notice related to the LCA is available at <http://edocket.access.gpo.gov/2008/pdf/E8-14464.pdf>.

The Department also seeks comment on measures to improve the labor certification program for the temporary employment of nonimmigrant agricultural workers. That notice is available at <http://edocket.access.gpo.gov/2008/pdf/E8-14465.pdf>.

#### 9. USCIS Extends Validity of EADs for Refugees

U.S. Citizenship and Immigration Services (USCIS) recently announced that it is extending the validity of initial Employment Authorization Documents (EADs) for refugees to two years after arrival in the United States. Previous policy required renewal of the EAD after one year.

USCIS said the new policy will reduce the financial burden on refugees by eliminating the need for many refugees to apply for renewal of work authorization documents before they are able to adjust status to permanent residence. There is no fee for the initial application for a refugee EAD, but applicants incur a \$340 fee for renewals. USCIS estimated that a refugee would request, at minimum, one EAD renewal before adjustment of status if the EAD validity period were not extended to two years.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f8ef93de9b21b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

## 10. TSA Testifies on Watch Lists; ACLU Protests

Transportation Security Administration (TSA) administrator Kip Hawley recently testified before the House Transportation and Infrastructure Subcommittee on Aviation on TSA's use of subsets of the terror watch list and airlines' misidentifying passengers on these watch lists, a topic that has been in the news recently as a CNN reporter and others have been sent repeatedly to secondary inspections following their alleged erroneous inclusion in the watch lists and inability to have their names removed.

The TSA noted that "misidentification hassles at the airline ticket counter is consistently among the most frustrating complaints of the traveling public." The TSA announced a solution that requires action by the airlines. The TSA said that each airline now has the flexibility to create a system to verify and store securely a passenger's date of birth, to clear up watch list misidentifications. By voluntarily providing this data to an airline and verifying that information at the ticket counter, the TSA said, travelers who were previously inconvenienced on every trip will now be able to check in online or at remote kiosks.

As an incentive for the airlines to take action, the TSA announced plans to collect data from air carriers to determine how many cleared passengers are being forced to the ticket counters to verify their identification before being issued a boarding pass. The TSA said it is also actively exploring enforcement action against air carriers who tell passengers inaccurately that they are watch-listed.

The TSA stated that fewer than 50,000 individuals are on the no-fly and selectee lists. Individuals on the no-fly and selectee lists are identified by law enforcement and intelligence entities as legitimate threats to transportation who require either additional screening or are prohibited from boarding an aircraft. The watch lists also include any aliases or variations an individual may use, which drives up the overall number of names on a list.

David Stempler of the Air Travelers Association was not impressed by the TSA's blaming airlines for the problems: "Airline security should always have been a government responsibility, and deflecting criticism to the airlines is inappropriate." The TSA is expected to assume responsibility for checking names against the lists early next year.

Meanwhile, the American Civil Liberties Union, which calculates that there are over one million names on the list, called on the House Homeland Security Committee to exercise vigorous oversight of the Department of Homeland Security programs that "endanger U.S. citizens' privacy and civil liberties without increasing security." Caroline Fredrickson, director of the ACLU's Washington Legislative Office, said, "Members of Congress, nuns, war heroes and other 'suspicious characters,' with names like Robert Johnson and Gary Smith, have become trapped in the Kafkaesque clutches of this list, with little hope of escape."

The TSA's notice is available at [http://www.tsa.gov/press/happenings/reporter\\_watch\\_list.shtm](http://www.tsa.gov/press/happenings/reporter_watch_list.shtm). Mr. Hawley's testimony is available at [http://www.tsa.gov/press/speeches/072408\\_hawley\\_aviation\\_security.shtm](http://www.tsa.gov/press/speeches/072408_hawley_aviation_security.shtm). Complaints may be filed online at [http://www.dhs.gov/xtrvlsec/programs/gc\\_1169676919316.shtm](http://www.dhs.gov/xtrvlsec/programs/gc_1169676919316.shtm). The ACLU's statements are at <http://www.aclu.org/privacy/35968prs20080714.html> and <http://www.aclu.org/privacy/36026prs20080717.html>. The ACLU's watch list counter is at <http://www.aclu.org/privacy/spying/watchlistcounter.html>.

#### 11. USCIS Revises Biometric Instructions for Reentry Permits and Refugee Travel Documents

U.S. Citizenship and Immigration Services (USCIS) has issued revised instructions for Form I-131, Application for Travel Document. The instructions include changes that require applicants for re-entry permits and refugee travel documents to provide biometrics (e.g., fingerprints and photographs) at a USCIS Application Support Center (ASC) for background and security checks and to meet requirements for secure travel and entry documents containing biometric identifiers.

The notice is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9c1161ccdc20b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

#### 12. USCIS Continues Suspension of Premium Processing for Religious Workers

U.S. Citizenship and Immigration Services (USCIS) announced that the suspension of premium processing service for religious worker (R-1) nonimmigrant visa petitions will continue at least until January 7, 2009. A previous six-month suspension was announced on January 4, 2008.

The Premium Processing Service provides faster processing of certain employment-based petitions and guarantees a 15-calendar day processing time. Because of the complexities of adjudicating R-1 nonimmigrant visa petitions, USCIS said it cannot reasonably ensure a level of processing service within 15 calendar days.

On April 25, 2007, USCIS proposed significant revisions to its regulations related to the special immigrant and nonimmigrant (R-1) religious worker visa classifications. The proposed rule suggested steps to eliminate fraud in the religious worker program and discussed potential vulnerabilities addressed in an August 2005 Benefit Fraud Assessment conducted by USCIS's Office of Fraud Detection and National Security. USCIS said it is considering comments on the proposed rule.

USCIS will continue processing R-1 nonimmigrant visa petitions, including procedures that may include inspections, evaluations, verifications, and compliance reviews for religious organizations. These procedures necessitate exceeding the 15-day guarantee for premium processing.

In the future, the agency said it may reconsider this decision if it is able to properly process these cases within 15 calendar days of receipt. USCIS may prescribe additional conditions of availability on the Premium Processing Service for religious worker petitions.

The USCIS notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543fd1a/?vgnextoid=788bc1cacd70b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

#### New Publications and Items of Interest

GAO: Improve passport operations. In 2007, following the implementation of new document requirements for travelers entering the U.S. from within the Western Hemisphere, the Department of State received a record number of passport applications. In June 2009 further document requirements are scheduled to go into effect and will likely lead to another surge in passport demand. In a report released on July 2008, the Government Accountability Office (GAO) examined (1) the extent to which the Department was prepared for the surge in passport demand and how its readiness affected passport operations, (2) the Department's actions to increase passport production capacity in response to the surge, and (3) the Department's readiness for near-term surges in demand and its strategy to improve passport operations.

The GAO noted that the Department was unprepared for the record number of passport applications it received in 2007, leading to significant delays. Reported wait times reached 10 to 12 weeks in the summer of 2007, more than double the normal wait, with hundreds of thousands of passports taking significantly longer. The Department had difficulty tracking individual applications and failed to effectively measure or communicate to applicants the total expected wait times, prompting many to re-apply and further straining processing capacity.

The Department took a number of emergency measures and accelerated other planned efforts to increase its passport production capacity in 2007. As a result of these efforts and the normal seasonal decline in passport applications, the GAO noted, wait times returned to normal by October 2007. According to Department estimates, these emergency measures cost \$42.8 million. Although the Department has taken steps to improve its ability to respond to near-term surges in passport demand, the GAO found that the Department lacks a comprehensive strategy to improve long-term passport operations. The GAO noted that the Department previously identified several deficiencies that limited the efficiency and effectiveness of passport operations, such as reliance on a paper-based work flow and ineffective communications. The Department identified a framework to guide its modernization efforts, but the GAO concluded that it does not have a comprehensive plan to prioritize and synchronize improvements to its passport operations. A comprehensive strategy for making these improvements would better equip the Department to handle a significantly higher workload in the future, the GAO said.

The report, "State Department: Comprehensive Strategy Needed to Improve Passport Operations" (GAO-08-891), is available at <http://www.gao.gov/new.items/d08891.pdf>.

USCIS ombudsman 2008 recommendations. The ombudsman for U.S. Citizenship and Immigration Services has released a chart of 2008 recommendations and activity, available at [http://www.dhs.gov/xlibrary/assets/cisomb\\_recommendations\\_to\\_uscis\\_status\\_chart.pdf](http://www.dhs.gov/xlibrary/assets/cisomb_recommendations_to_uscis_status_chart.pdf).

Article: emphasis on border control ineffective. Philip Kretsedemas, co-editor of *Keeping Out the Other: A Critical Introduction to Immigration Today* and professor of sociology at the University of Massachusetts, has written "What's Different About the Immigration Problem We Face Today - And What Can Be Done About It." The article notes that the debate about undocumented migration still "seems to be lodged in a paradigm that is organized around border control. Although this emphasis is not entirely misplaced, it also tends to produce distorted explanations of undocumented migration and ineffective strategies for controlling undocumented migration." The article is available at <http://hnn.us/articles/49469.html>.

## Government Agency Links

*Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:*

USCIS Service Center processing times online:

<https://egov.uscis.gov/cris/jsps/ptimes.jsp>

Department of Labor processing times and information on backlogs:

<http://www.foreignlaborcert.doleta.gov/times.cfm>

Department of State Visa Bulletin:

[http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

## Recent Firm News & Upcoming Events:

Immigration Employment Eligibility Compliance Seminar. With recent increased government audits and enforcement actions, on September 23, 2008, the Wolfsdorf Immigration Law Firm will present a seminar at the Fairmont Miramar hotel in Santa Monica designed for H.R. staff. Topics include: compliance with employment eligibility regulation; I-9 issues and developing corporate compliance programs. If you are interested in attending, please contact Art Rivadeneyra at [art@wolfsdorf.com](mailto:art@wolfsdorf.com). Register early as space is limited.

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