
WOLFSDORF IMMIGRATION NEWSLETTER
February 2009

1. Prepare Early for H-1B Lottery

Every year, there is a mad scramble for available H-1B visa numbers. As many companies are aware, often they are gone in a single day following a random "lottery" run by U.S. Citizenship and Immigration Services in early April. There are many more applicants than available numbers.

U.S. Citizenship and Immigration Services reportedly plans to issue a rule in the spring or summer of 2009 to streamline the H-1B paperwork required to participate in the fiscal year 2010 lottery. The rule would propose a "pre-registration" system with a shorter application required for the lottery, and the full H-1B petition required for lottery winners. That system will not be in place for this April's H-1B rush, however.

Wolfsdorf Immigration Law Group recommends contacting your WILG attorney now to begin preparing your H-1B strategy and paperwork.

2. Use of New Form I-9 Delayed Until April 3, 2009.

U.S. Citizenship and Immigration Services (USCIS) announced on February 2, 2009 that it has delayed by 60 days, until April 3, 2009, the implementation of an interim final rule requiring the use of a revised Form I-9, originally scheduled to go into effect February 2, 2009. The rule, entitled "Documents Acceptable for Employment Eligibility Verification" was published in the Federal Register on Dec. 17, 2008.

Note: The Society for Human Resources reported on February 2, 2009 that employers who use the new form prior to the April 3, 2009 effective date are subject to civil monetary penalties.

The delay will provide DHS with an opportunity for further consideration of the rule and also allows the public additional time to submit comments. A notice announcing the delay was transmitted today to the Federal Register. In addition, USCIS has reopened the public comment period for 30 days, until March 4, 2009.

Employers must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States. The interim final rule will amend regulations governing the types of acceptable identity and employment authorization documents employees may present to their employers for completion of the Form I-9. Under the interim rule, employers will no longer be able to accept expired documents to verify employment authorization on the Form I-9.

The interim final rule and an informational copy of the revised Form I-9 will continue to be available for public comment at www.regulations.gov.

An informal copy of the revised Form I-9 for use on or after April 3, 2009 is available here: www.uscis.gov/files/form/I-9_IFR_02-02-2009.pdf .

3. Rule Requiring Contractors to Use E-Verify Suspended Again, Until May 21

The U.S. Chamber of Commerce said the federal government agreed to its request to postpone implementation until May 21, 2009, of a new rule requiring federal contractors to use E-Verify. "The federal government agreed that the new administration needs time to re-think mandatory E-Verify use, particularly in light of the stressed economy," said Robin Conrad, executive vice president of the National Chamber Litigation Center, the Chamber's public policy law firm. "We are hopeful that the incoming administration will agree that E-Verify is the wrong solution at the wrong time."

Randy Johnson, vice president of Labor, Immigration and Employee Benefits at the U.S. Chamber, said, "The new administration's interest in reviewing the rule is a promising development, but it doesn't change the fact that the executive branch may not make E-Verify use mandatory when Congress clearly said that it must be voluntary. We're cautiously optimistic that the incoming administration will make the right choice, but if not it will be up to the court to settle the issue."

This was the second recent postponement. The American Council on International Personnel (ACIP) reported that an agreement previously was reached with the Department of Homeland Security to suspend implementation of the rule until February 20, 2009. It had been slated to take effect on January 15, 2009.

USCIS also announced that more than 100,000 employers have signed up to participate in E-Verify, an online system employers use to verify the work authorization of newly hired employees. USCIS said that employers have run more than two million queries through the system since October 2008.

Meanwhile, the new stimulus package bill approved by the House of Representatives on January 28, 2009, includes provisions that would mandate the use of E-Verify by federal contractors receiving stimulus funds. The bill states that "[n]one of the funds made available in this Act may be used to enter into a contract with an entity that does not participate in the E-verify program." The Senate is expected to act on the economic stimulus bill this week. It remains to see whether this E-Verify provision will remain in the final bill.

The Chamber of Commerce's announcement is available at http://www.uschamber.com/nclc/090128_pr.htm. The House bill is at <http://thomas.loc.gov/cgi-bin/query/D?c111:2:./temp/~c11161rDtW::>.

4. Several Visa Categories Show Movement in February

For February 2009, the Department of State's Visa Bulletin shows movement in the priority dates for several employment-based categories. For example, although the Worldwide category stays put, the China-mainland born second preference category moves ahead almost six months, from July 8, 2004, to January 1, 2005. India's second preference category advances six months, from July 1, 2003, to January 1, 2004. China's third preference category similarly advances four months, from June 1, 2002, to October 1, 2002. Mexico's third preference employment-based category advances four and a half months, from November 15, 2002, to April 1, 2003.

In February, however, China's "Other Workers" category retrogresses from March 15, 2003, to October 1, 2002, as do India's (from March 15, 2003, to October 15, 2001) and Mexico's (from March 15, 2003, to October 15, 2001). The Philippines third preference and "Other Workers" categories stay put at May 1, 2005, and March 15, 2003, respectively.

The Visa Bulletin for February 2009 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4417.html.

5. VWP Travelers Must Apply for Security Clearance Online

Those seeking to travel to the U.S. under the Visa Waiver Program are now subject to enhanced security requirements as of January 12, 2009. All eligible travelers who wish to travel under the Visa Waiver Program must apply for authorization using the Electronic System for Travel Authorization (ESTA), available at <https://esta.cbp.dhs.gov/>. All VWP travelers applying for admission at a U.S. port of entry, including VWP travelers who have obtained travel authorization via ESTA, also must present a completed Form I-94W to U.S. Customs and Border Protection.

The stimulus package bill passed by the House of Representatives includes provisions on the Visa Waiver Program that would enhance program security requirements and extend the VWP to nationals of foreign countries "that are partners in the war on terrorism." The bill also would "support and expand tourism and business opportunities to enhance long-term economic competitiveness," and would establish a "maximum visa overstay rate" for participating countries.

More information about ESTA is available at http://www.cbp.gov/xp/cgov/travel/id_visa/esta/. Additional information about the VWP is available at http://travel.state.gov/visa/temp/without/without_1990.html. The full text of the House bill, H.R. 1, is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1enr.txt.pdf.

6. USCIS Comments on L-1B Intracompany Transferee Denials

U.S. Citizenship and Immigration Services reportedly plans to address complaints about an L-1B visa denial increase some time this year. "Companies are trying to expand the definition of what is 'specialized knowledge' under the L-1B program to use it as an alternative to the H-1B visa because there is no congressionally mandated cap on L-1B visas," USCIS Acting Deputy Director Michael Aytes said, adding that the current standard used by USCIS adjudicators requires more than "just working for a company overseas for a year."

7. DHS Announces VWP for Guam-Commonwealth of the Northern Mariana Islands

The U.S. Department of Homeland Security (DHS) announced an interim final rule that replaces the current Guam Visa Waiver Program (VWP) with a new Visa Waiver Program for Guam and the Commonwealth of the Northern Mariana Islands (CNMI), to be implemented June 1, 2009. The rule also authorizes the department's U.S. Customs and Border Protection (CBP) to establish as many as six new ports of entry in the region to administer and enforce the Guam-CNMI VWP and to allow for immigration inspections.

The revised Guam-CNMI VWP allows visa-free entry for nonimmigrant visitors from eligible countries to Guam and the CNMI for business or leisure travel, and extends visiting time from 15 to 45 days. The current Guam VWP and CNMI immigration laws will continue to apply until June 1, 2009.

Travelers seeking admission to Guam under the new program must possess a valid, unexpired machine-readable passport and present valid and completed CBP Forms I-94 and I-736, and must not have previously violated the terms of any admission to the U.S.

According to the interim final rule, current members of the Guam-CNMI VWP include Australia, Brunei, Indonesia, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, Republic of Korea, Singapore, Solomon Islands, Taiwan, the United Kingdom, Hong Kong, Vanuatu, and Western Samoa.

The interim final rule, published in the Federal Register on January 16, 2009, is available at <http://edocket.access.gpo.gov/2009/pdf/E9-942.pdf>.

8. USCIS Reaches H-2B Cap for Second Half of Fiscal Year 2009

U.S. Citizenship and Immigration Services (USCIS) announced on January 7, 2009, that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap of 33,000 for the second half of fiscal year 2009, for new H-2B worker petitions requesting employment start dates before October 1, 2009.

If deemed necessary, USCIS said it may apply a computer-generated random selection process to all petitions that are subject to the cap and received on January 7, 2009. USCIS will reject, and return the fee, for all cap-subject petitions not selected.

Petitions for workers who are currently in H-2B status do not count toward the biannual H-2B cap. USCIS will continue to process petitions filed to extend the stay of a current H-2B worker in the U.S.; change the terms of employment for current H-2B workers and extend their stay; or allow current H-2B workers to change or add employers and extend their stay.

The H-2B notice is available at http://www.uscis.gov/files/article/h2b_8jan09.pdf.

9. EB-5 Immigrant Investor Filing Location Changes

U.S. Citizenship and Immigration Services (USCIS) announced that petitions and applications related to the entrepreneur (EB-5) immigrant classifications and Regional Center proposals under the EB-5 immigrant investor pilot program must be filed at the California Service Center (CSC).

Previously, EB-5 petitions and applications were filed at either the Texas Service Center (TSC) or the CSC, depending on where the entrepreneur's commercial enterprise was located. Regional Center proposals were submitted to the Chief of Service Center Operations at USCIS headquarters. USCIS said this change in filing locations is necessary to improve efficiency in processing EB-5-related filings. USCIS has established a unit at the California Service Center with adjudicators dedicated to EB-5 adjudications.

This change was effective January 26, 2009. For a 30-day period that began on January 9 and ends on February 9, 2009, EB-5 related petitions and applications mailed to USCIS headquarters or the Texas Service Center will be forwarded to the California Service Center. After February 9, EB-5 petitions and applications received at an incorrect filing location will be rejected and returned with instructions to re-file at the correct address.

The notice is at http://www.uscis.gov/files/article/update_eb5_filing_location_change_12Jan08.pdf, and a related notice was published in the Federal Register on January 9, 2009, at <http://edocket.access.gpo.gov/2009/pdf/E9-231.pdf>.

10. New Forms Required for H-2A and H-2B Programs

In conjunction with regulations that went into effect in January 2009 for the H-2A and H-2B programs, the Department of Labor has created new forms to collect the necessary information from employers applying for labor certifications. Employers must begin using Form ETA-9142. In addition, for the H-2A program, employers must fill out and

submit Appendix A.1 and Appendix A.2. For the H-2B program, employers must fill out and submit Appendix B.1.

For instructions on how to complete the form and appendices, see http://www.foreignlaborcert.doleta.gov/pdf/OMBETAForm9142_Instructions.pdf.

The H-2B final rule requires the use of the new ETA-9141 for prevailing wage determinations. However, the use of this form will only begin after the transition period outlined in the rule is completed. Therefore, the DOL said that the ETA-9141 will be posted toward the end of the transition period.

The H-2A final rule is available at http://www.foreignlaborcert.doleta.gov/pdf/H2A_FinalRule.pdf.

The H-2B final rule is available at <http://www.foreignlaborcert.doleta.gov/pdf/H2BFinalRule.pdf>.

11. Attorney General Finds No Right To Effective Counsel in Removal Proceedings

In *Matter of Compean*, Attorney General Michael Mukasey found on January 7, 2009, that noncitizens have no constitutional right to an attorney in immigration removal proceedings. Although they have a statutory privilege to retain a lawyer, if that counsel is ineffective, they have no recourse, the Attorney General said. The decision notes that the Board of Immigration Appeals or an immigration judge may reopen removal proceedings in extraordinary cases based on egregious error by a lawyer, accredited representative, or nonlawyer that the person erroneously believed to be a lawyer.

The decision provides a framework and a list of documentation for filing a claim of deficient performance of counsel.

The decision is available at <http://www.usdoj.gov/eoir/vll/intdec/vol24/3632.pdf>.

The American Immigration Lawyers Association, which filed an amicus brief, is following this case and posting updates at <http://www.aifl.org/lac/lac-ineffective.shtml>.

New Publications and Items of Interest

EB-5 investor visas; AC21 issues. U.S. Citizenship and Immigration Services (USCIS) has added comments and Q&A from a teleconference to its online library: "Teleconference on EB-5 Investor Visas: Opportunities and Challenges," recorded in September 2008.

The teleconference is available at http://www.dhs.gov/xabout/structure/gc_1232142118947.shtm.

USCIS also has added an update on AC21 issues: "Did USCIS Immediately Deny Your

Adjustment of Status Application Following a Change of Employment?", available at http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm#1.

On December 12 and 15, 2008, the Department of Labor (DOL) held stakeholder briefings on revised H-2A regulations that took effect on January 17, 2009. DOL staff described procedures under the new regulation for filing and reviewing H-2A labor certification applications, and preparation of the new application form, ETA Form 9142. The briefings also included discussion of changes to DOL enforcement procedures.

To see the PowerPoint slide presentation on the new H-2A foreign labor certification process and form, go to the January 16, 2009, entry at http://www.foreignlaborcert.doleta.gov/eta_default.cfm#backlog and click on the link.

Q&A on religious worker final rule. U.S. Citizenship and Immigration Services (USCIS) published a final rule on the special immigrant and nonimmigrant religious worker visa categories on November 26, 2008.

A supplemental Q&A for religious workers is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=e51026e8bb89e110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

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

Recent Firm News:

Bernie Wolfsdorf, AILA President Elect will speak on "Hot Topics in Employment-Based Immigration and Enforcement" at the AILA 2009 Northwest Regional Immigration Law Conference on February 12, 2009 in Seattle, Washington.

Rita Sostrin and **Avi Friedman** will present a seminar on U.S. Immigration for Physicians at the University of Chicago Gleacher Center in Chicago, Illinois on February 21, 2009. Topics covered will include: J-1 Waivers; Nonimmigrant Visa Options for

Physicians and Scientists; Immigrant Visa Options for Physicians and Scientists; and U.S. Visa assistance at U.S. Consular Posts in Canada for J-1, H-1B, and O-1 visas.

Tien-Li Loke Walsh was recently an invited speaker at an industry event, "Examining H-1B Visas & High-Skilled Asian Immigration" sponsored by the Alfred P. Sloan Foundation and cosponsored by the UCLA Asian American Studies Center, UCLA School of Public Affairs, and the UCLA Canadian Studies Program. The conference explored the economic and policy implications of high-skilled immigration policy and the H-1B visa in both Asia and the United States. In addition, Ms. Loke Walsh continues to speak at immigration workshops around Southern California, including the UCLA Anderson School of Management, the UCLA Law School and the University of California, Riverside.

Wolfsdorf Immigration Law Group is proud to announce the launch of our new website at www.wolfsdorf.com. We've re-designed our website to give ourselves a fresh, new look that mirrors WILG today. We are very pleased with the new site and its design undertones of quality that match the values and sophistication of our stature in the practice of immigration law. We hope you like it!

Visitors to the site will now find up-to-date news on immigration law, a regular newsletter, full services descriptions, and a totally new look and feel.

Please let us know what you think of our new design. We would love to get your feedback. Write to art@wolfsdorf.com.

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