

WOLFSDORF IMMIGRATION NEWSLETTER NOVEMBER 2008

1. USCIS Estimates 21 Percent of H-1B Cases Involve Fraud or Technical Violations

U.S. Citizenship and Immigration Services' (USCIS) Office of Fraud Detection and National Security, a division of the National Security and Records Verification Directorate, collaborated with other USCIS components on a new report, "H-1B Benefit Fraud & Compliance Assessment," released in September 2008. The report estimates that about one in every five H-1B cases involves either fraud or a technical violation.

There were a total of 51 cases within the sample of 246 H-1B petitions that USCIS said represented either fraud, a technical violation, or multiple technical violations. USCIS said the cases reviewed constituted "a statistically valid random sampling of pending and completed cases over a recent six-month period." The agency noted that "not all violations will rise to the level that would warrant a criminal investigation or prosecution," and that the "vulnerabilities and abuses" identified "need not lead to a criminal investigation and/or prosecution in order to be reported for [Benefit Fraud and Compliance Assessment] purposes since systemic vulnerabilities ultimately may contribute to higher rates of successful fraudulent filings." USCIS used the "overall violation rate" of 20.7 percent to extrapolate an estimate of approximately 20,000 petitions nationwide that "may have some type of fraud or technical violation(s)."

USCIS also identified "primary fraud or technical violation indicators," including:

1. Firms with 25 or fewer employees have higher rates of fraud or technical violation(s) than larger-sized companies.
2. Firms with an annual gross income of less than \$10 million have higher rates of fraud or technical violations than firms with an annual gross income greater than \$10 million.
3. Firms in existence less than 10 years have higher incidences of fraud or technical violations than firms with an annual gross income greater than \$10 million.

4. The results indicate that H-1B petitions filed for accounting, human resources, business analysts, sales, and advertising occupations are more likely to contain fraud or technical violations than other occupational categories.
5. Beneficiaries with only bachelor's degrees had higher fraud or technical violation rates than did those with graduate degrees.

USCIS concluded that the results of this study "have established a 21% baseline fraud and technical violation(s) rate for H-1B petitions. Given the significant vulnerability, USCIS is making procedural changes, which will be described in a forthcoming document."

Concerns have been expressed about the small sample size (0.2 percent of the 96,827 H-1B petitions filed between October 1, 2005, and March 31, 2006) and the fact that over 80 percent of the violations found by the USCIS involved Department of Labor regulations outside of USCIS's mission of adjudicating requests for immigration benefits.

The USCIS report is available at <http://www.ieceusa.org/policy/reports/DHSH1BFraudRpt.pdf>.

2. U.S. Increases Period of Stay for Trade-NAFTA Professionals From Canada and Mexico

U.S. Citizenship and Immigration Services (USCIS) has increased the maximum period of time a Trade-NAFTA (TN) professional worker from Canada or Mexico may remain in the U.S. before seeking readmission or obtaining an extension of stay. The final rule changes the initial period of admission for TN workers from one to three years, making it equal to the initial period of admission for H-1B professional workers.

Eligible TN nonimmigrants now may receive extensions of stay in increments of up to three years instead of the previous maximum period of stay of one year. Spouses and unmarried minor children of TN nonimmigrants in their corresponding nonimmigrant classifications will also benefit from the new regulation.

The TN nonimmigrant visa classification is available to eligible Mexicans and Canadians with at least a bachelor's degree or appropriate professional credentials who work in certain qualified fields pursuant to the North American Free Trade Agreement (NAFTA). Qualified professions identified within NAFTA include, but are not limited to, accountants, engineers, attorneys, pharmacists, scientists, and teachers.

The final rule, effective October 16, 2008, is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24600.pdf>.

The announcement, issued on October 14, 2008, is available at http://www.uscis.gov/files/article/tn_nonimmigrant_changes_update.pdf.

3. Seven Countries To Be Added to Visa Waiver Program

The Bush administration announced on October 17, 2008, that it plans to add seven countries to the Visa Waiver Program (VWP): the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, and South Korea. President George W. Bush said that eligible citizens of those countries will be able to travel to the U.S. for up to 90 days without a visa "in about a month." So-called "roadmap" countries, which are on track to qualify for VWP admission, include Bulgaria, Cyprus, Greece, Malta, Poland, and Romania.

The VWP currently allows the citizens of 27 countries to travel to the U.S. for tourism or business without obtaining a visa. Nationals participating in the VWP must travel only for business, pleasure, or transit; stay in the U.S. for 90 days or fewer; and, if arriving by sea or air, hold a valid ticket for return or onward travel and enter the U.S. aboard an air or sea carrier that has been designated as a participant in the VWP.

President Bush's statement is available at <http://www.whitehouse.gov/news/releases/2008/10/20081017-5.html>.

A fact sheet is available at <http://www.whitehouse.gov/news/releases/2008/10/20081017-15.html>.

4. USCIS Withdraws Lockbox for Naturalization Applications

U.S. Citizenship and Immigration Services (USCIS) has withdrawn its instruction issued on September 12, 2008, that in certain instances the Application for Naturalization (Form N-400) would be filed at a USCIS lockbox facility rather than at the USCIS Service Center. The notice was to take effect on October 14, 2008. USCIS has decided to delay implementation while technical issues are resolved and has withdrawn as of October 10, 2008, the notice published in September. Applicants should continue to file their N-400s according to the instructions on the form.

The new notice is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24095.pdf>.

5. State Dept. Issues Final Rule on Foreign Health Care Worker Certifications

The Department of State (DOS) issued a final rule effective October 20, 2008, that adopts as final without change the Department's interim rule published at 67 Fed. Reg. 77158 (Dec. 17, 2002). The rule requires certain health care workers seeking admission to the U.S., excluding physicians, to present certificates establishing competency in a specific health care field. This certification is issued by the Commission on Graduates of Foreign Nursing Schools (CGFNS) or other credentialing organizations that have been approved by the Department of Homeland Security (DHS) in consultation with the Department of Health and Human Services. DOS said this rule facilitates greater uniformity between the regulations of DHS and the Department of State.

The final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24474.pdf>.

The interim rule is available at <http://edocket.access.gpo.gov/2002/pdf/02-31603.pdf>.

6. Department of State Requests Proposals for International Visitor Program

The Community Relations Branch of the Department of State's Office of International Visitors, Bureau of Educational and Cultural Affairs, issued a request for grant proposals (RFP) on October 9, 2008, on the design and implementation of an airport arrival and departure program at New York's John F. Kennedy (JFK) International Airport and New Jersey's Newark International Airport.

A cooperative agreement for \$195,000 is expected to be awarded in early 2009, pending availability of fiscal year 2009 funds. The 18-month award will begin on or about January 1, 2009, and end on September 30, 2010.

Proposed funding would support the following activities: Meet incoming International Visitor Leadership Program (IVLP) participants at JFK International Airport and assist them to their connecting flights; meet incoming IVLP participants at Newark International Airport and assist them to their connecting flights; provide assistance to outgoing IVLP participants, through U.S. Customs at JFK International Airport and Newark International Airport; and liaise with U.S. Customs and Border Protection, Transportation Security Administration officials, and Port Authority officials at both airports.

The RFP is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24020.pdf>.

7. Department of Homeland Security Streamlines Process for Short-Term Visitors Infected With HIV

The Department of Homeland Security (DHS) issued a final rule effective October 6, 2008, to provide, on a "limited and categorical" basis, a more streamlined process for nonimmigrants infected with human immunodeficiency virus (HIV) who wish to visit the U.S. on a short-term basis. Under the final rule, DHS will allow those who are HIV-positive to enter as visitors (for business or pleasure) for a temporary period not to exceed 30 days, without being required to seek such admission under the more complex (individualized, case-by-case) process provided under current DHS procedures. Additionally, DHS has decided to permit an additional "period or periods of satisfactory departure in exigent circumstances" under a provision modeled after the Visa Waiver Program.

Nonimmigrants who do not meet the specific requirements of the rule or who do not wish to consent to the conditions imposed by the final rule may seek admission under current procedures and obtain a case-by-case determination of their eligibility for a waiver of the nonimmigrant visa requirements concerning inadmissibility for those infected with HIV.

The final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-23287.pdf>.

8. State Dept. Eliminates Board of Appellate Review

The Department of State (DOS) issued a final rule effective October 20, 2008, that eliminates the Department's Board of Appellate Review (L/BAR), which had been authorized to review certain Department determinations, in particular those related to loss of citizenship and passport denials. Because L/BAR's jurisdiction has been superseded or made obsolete, and in large part replaced by review of loss of citizenship and passport matters by the Bureau of Consular Affairs, this rule eliminates L/BAR and authorizes on a discretionary basis an "alternative, less cumbersome" review of loss of nationality determinations by the Bureau of Consular Affairs.

The rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24472.pdf>.

9. DHS Exempts Certain Systems From Privacy Act Requirements, Including Legal Records, SEVIS

The Department of Homeland Security (DHS) has published final rules exempting certain systems from some provisions of the Privacy Act because of "criminal, civil, and administrative enforcement requirements." The systems include the General Counsel Electronic Management System (GEMS). The DHS noted that Immigration and Customs Enforcement (ICE) attorneys work closely with investigators throughout the process of adjudicating immigration cases. ICE attorneys "must

have access to investigative documents and related materials in order to form their decisions about how to handle particular cases." Additionally, DHS noted, ICE attorneys create attorney work product associated with immigration proceedings. The GEMS system will facilitate the collection and maintenance of materials used by ICE attorneys in immigration adjudications. "It will supplement and ultimately replace the current attorney work product paper files that are primarily stored and managed in the hardcopy alien file commonly known as the 'A-file,' " DHS noted.

DHS also is claiming exemption from certain requirements of the Privacy Act for the Student and Exchange Visitor Information System (SEVIS). DHS noted that because the purpose of the SEVIS system is to collect and maintain pertinent information on nonimmigrant students and exchange visitors, and the schools and exchange visitor program sponsors that host them while in the U.S., "it is possible that the information in the record system may pertain to national security or law enforcement matters." Disclosure of related information would therefore present a "serious impediment" to law enforcement and national security efforts, DHS said. Disclosure of the information also would permit an individual who is the subject of a record "to impede the investigation and avoid detection or apprehension, which undermines the entire system." DHS said this exemption is "a standard law enforcement and national security exemption utilized by numerous law enforcement and intelligence agencies."

DHS said it is establishing a new agency-wide system of records under the Privacy Act for DHS General Legal Records. This will ensure that all components of DHS follow the same privacy rules for collecting and handling general legal records. DHS is proposing to exempt its general legal records from provisions of the Privacy Act.

The GEMS final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24996.pdf>.

The SEVIS final rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-25000.pdf>.

The General Legal Records proposed rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-24997.pdf>.

10. Slow Forward Movement Predicted for Employment Categories

The Department of State's Visa Office reported in the November 2008 Visa Bulletin that the level of demand being received from U.S. Citizenship and Immigration Services (USCIS) offices indicates that USCIS has a significant number of cases with priority dates that are earlier than the established cut-offs. This is likely to result in slow forward movement of the cut-off dates for most employment visa categories during the next few months, the Department said. Sudden changes in

the USCIS demand patterns could result in fluctuations in the monthly cut-off dates, and retrogressions cannot be ruled out during fiscal year 2009.

New Publications and Items of Interest

Customs searches, questioning of travelers. The Asian Law Caucus and the Electronic Frontier Foundation reported that earlier this year, they sued the Department of Homeland Security under the Freedom of Information Act (FOIA) for failing to turn over records on Customs searches and questioning. This summer, they received many of the documents they had sought showing how much Immigration and Customs Enforcement agents' power to read and copy the personal papers of travelers has increased over the years. The documents also showed that Customs issued a directive (first issued in 2004, revised in 2006) that called for intensive questioning of individuals deemed to be suspected terrorists, which the Asian Law Caucus said may account for the rise in complaints from Muslim Americans and others of invasive searches and interrogations at the U.S. border. The Asian Law Caucus continues to gather reports of invasive searches and questioning to support its advocacy efforts, and has released Tips for Travelers on handling encounters with Customs, including filing complaints and FOIA requests. The tips include travelers returning to the U.S. and immigrants leaving the U.S. See http://www.asianlawcaucus.org/site/alc_dev/section.php?id=99.

USCIS ombudsman issues recommendations on EAD delays. The U.S. Citizenship and Immigration Services ombudsman (ombudsman) reported on October 2, 2008, that it has recently received many complaints from foreign nationals who have lost, or are in danger of losing, their jobs in the U.S. because the agency is not issuing Employment Authorization Documents (EADs) within 90 days of application receipt and is not granting interim EADs, as required by regulation. USCIS has posted processing dates over 90 days for EADs at service centers but, the ombudsman found, "has not provided a sufficient explanation on the delays or consistent information on alternative measures that may assist in addressing EAD delays." In a preliminary response, USCIS informed the ombudsman that it will immediately (1) audit its caseload to determine which cases have been pending for more than 70 days, (2) process service requests at 75 days rather than 90 days, and (3) adjudicate EADs that are outside normal processing times within four hours for customers who appear at local offices.

The report, "Recommendations on USCIS Processing Delays for Employment Authorization Documents," is available at http://www.dhs.gov/xlibrary/assets/cisomb_ead_recommendation_35.pdf.

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 & Upcoming Events:](#)

Wolfsdorf Immigration Law Group is proud to announce that Bernie Wolfsdorf and Tien-Li Loke Walsh have been selected for inclusion in the 2009 edition of *The Best Lawyers in America*® in the specialty of Immigration Law. For over a quarter of a century, *Best Lawyers*® has been regarded - both by the profession and the public - as the definitive guide to legal excellence in the United States. Selection to *Best Lawyers* is based on an exhaustive and rigorous peer-review survey comprising more than 2.5 million confidential evaluations by the top attorneys in the country. Because no fee or purchase is required, being listed in *Best Lawyers* is considered a singular honor.

Bernie Wolfsdorf is scheduled to speak on "Hot Topics in Immigration Law" at the 21st Annual American Immigration Lawyers Association (AILA) California Chapters Conference on Friday, November 14, 2008.

Bernie Wolfsdorf will speak at AILA's 11th Annual New York Chapter Immigration Law Symposium on Wednesday, December 3, 2008. The panel is titled "Have You Tried Filing an I-129 Lately? The Attack on Non-immigrant Visas."

Avi Friedman will present a panel on Non-immigrant Visa Applications in Mexico and Canada at the AILA California Chapters Conference on Friday, November 15, 2008.

Bernie Wolfsdorf and Avi Friedman will be speaking at the NAFSA Bi-Regional Conference in Honolulu, Hawaii on Wednesday, November 12, 2008. Their panel is entitled, "Riding the Rough Waves in Consular Visa Applications."

Avi Friedman presented a Consular Update Panel at the NAFSA Region 2 conference in Merida Mexico on Monday, November 3, 2008.

Rita Sostrin will be speaking at the NAFSA Bi-Regional Conference in Honolulu, Hawaii on November 14, 2008. Her panel is entitled, "Marriage of Convenience or Real Love? Immigration Law Firms and International Student Offices CAN Find the Perfect Relationship."

Tien-Li Loke Walsh continues her work with students and professionals alike, conducting immigration workshops about various temporary work visas and green cards. Most recently, Ms. Loke Walsh spoke at several campuses, including USC, Cal State Fresno, UCLA Anderson School of Business, and USC Marshall School of Business.

The Wolfsdorf Immigration Law Group extends congratulations and much love to Fuji M. Yussefieh who was married to Jo Ben Whittenburg on October 18, 2008.

Disclaimer/Reminder

This e-mail does not constitute direct legal advice and is for informational purposes only. The information provided should never replace informed counsel when specific immigration-related guidance is needed.