

LitwinLaw Update

December 1, 2007

Headlines:

- **1. No-Match Letters Will Not Be Sent This Year, SSA Says; DHS Will Revise Rule** - The SSA will not send out no-match letters this year to employers, in response to a preliminary injunction.
- **2. USCIS Releases New Form I-9** - USCIS has revised the I-9 Employment Eligibility Verification Form, to be required beginning December 26, as a first step toward achieving the document reduction goals. If you handle I-9s, this is important to read.
- **3. Basic Pilot Findings Released** - The accuracy of USCIS' database used for verification has "improved substantially" since the start of the Basic Pilot program, but further improvements are needed.
- **4. Nonimmigrant Visa Delays Caused by Electronic Verification Requirement** - The change has resulted in delays from interview to visa issuance at many posts.
- **5. DHS To Begin Requiring 10 Fingerprints at Ports of Entry** - The Department of Homeland Security (DHS) will begin requiring 10 fingerprints, instead of just two, from international visitors who fly into certain ports of entry.
- **6. DHS Converting Checks Into Electronic Transfers for I-765** - The Department of Homeland Security is now converting funds from checks into electronic funds transfers for the Application for Employment Authorization.
- **7. Department of State Issues Record Number of Student Visas** - The Department of State announced that it has issued a record number of visas to students to study in the U.S.
- **8. ICE Nominee's Confirmation Is Uncertain in Senate** - A confirmation vote in the Senate for Julie Myers to direct U.S. Immigration and Customs Enforcement has not yet been scheduled.
- **9. Target and Whole Foods Market Charged with Discriminating Against Immigrant Workers** - The charges allege that the companies illegally fired and suspended two immigrant workers who had presented clear evidence of their authorization to work in the U.S.

- **10. State Dept. Issues Final Passport Rule** - The final rule reorganizes, restructures, and updates passport regulations.
- **11. China, India Second Preference Cut-Off Dates Retrogress; Other Projections** - The China-mainland born and India employment second preference cut-off dates both will retrogress in December; the Department of State also made other projections.
- **12. Japan Begins Fingerprinting, Photographing Foreign Visitors** - Those refusing to comply will be denied admission into Japan and will be returned to their port of origin.

Also in this issue:

[New Publications and Items of Interest](#)

[Government Agency Links](#)

Details...

1. No-Match Letters Will Not Be Sent This Year, SSA Says; DHS Will Revise Rule

A Social Security Administration (SSA) spokesperson reportedly has stated that the SSA will not send out no-match letters this year to employers, in response to an October 10, 2007, preliminary injunction from the U.S. District Court for the Northern District of California that enjoined and restrained the Department of Homeland Security (DHS) and the SSA from implementing the final rule, "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." The preliminary injunction did not preclude the SSA from sending out its traditional no-match letters without the final rule language. According to sources, the SSA is unlikely to send out no-match letters until spring 2008 at the earliest, when the DHS has said it plans to revise the rule. SSA said it did not have sufficient time to revise the no-match letter in 2007. The SSA sends no-match letters, which detail discrepancies between SSA data and information sent in by employers, to approximately 138,000 employers each year concerning as many as nine million employees.

[Back to Top](#)

2. USCIS Releases New Form I-9

U.S. Citizenship and Immigration Services (USCIS) has revised the I-9 Employment Eligibility Verification Form, to be required beginning December 26, as a first step toward achieving the document reduction goals under the

Illegal Immigration Reform and Immigrant Responsibility Act and "as a further step in its ongoing work toward reducing the number of documents used to confirm identity and work eligibility," the agency said.

The most significant change to the I-9 is the elimination of the following five documents from List A of the List of Acceptable Documents:

- Certificate of U.S. Citizenship (N-560 or N-561)
- Certificate of Naturalization (N-550 or N-570)
- Alien Registration Receipt Card (I-151)
- Unexpired Reentry Permit (I-327)
- Unexpired Refugee Travel Document (I-571)

One document was added to List A of the List of Acceptable Documents:

- Unexpired Employment Authorization Document (I-766)

All the Employment Authorization Documents with photographs that are in circulation are now included as one item on List A:

- I-688, I-688A, I-688B, I-766

Instructions for the I-9 also now state that the employee is not obliged to provide the Social Security Number in Section 1 of the I-9, unless he or she is employed by an employer who participates in E-Verify (formerly Basic Pilot). The section on Photocopying and Retaining Form I-9 now includes information about electronically signing and retaining I-9 forms.

Employers should begin using the amended I-9 "(Rev. 06/05/07)N" immediately for all individuals hired on or after November 7, 2007. The Department of Homeland Security (DHS) said it "recognizes that employers should be afforded a period of time to transition to the amended Form I-9." The DHS therefore will not seek penalties against an employer for using a previous version of the I-9 during a transition period ending on December 26, 2007. After the transition period, employers who fail to use the revised I-9 may be subject to penalties.

Employers only need to complete the new I-9 for new employees. Employers do not need to complete new forms for existing employees, but employers must use the revised I-9 when their employees require reverification.

The new I-9 form is available at <http://www.uscis.gov/files/form/i-9.pdf>. The updated Handbook for Employers (M-274) is available at <http://www.uscis.gov/files/nativedocuments/m-274.pdf>. Details about the revised I-9 are available at <http://www.uscis.gov/files/pressrelease/FormI9FS110707.pdf>. A reminder

with the deadline is available at <http://www.uscis.gov/files/pressrelease/FormI9Reminder112307.pdf>. The USCIS Federal Register notice dated November 26, 2007, is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-5790.pdf>. Copies of the documents that are acceptable under the new I-9 requirements may be obtained in a brochure, "Guide to Selected U.S. Travel and Identity Documents" (M-396), which may be ordered in bulk from U.S. Customs and Border Protection, National Distribution Center, P.O. Box 68912, Indianapolis, IN 46268; fax: (317) 290-3046.

[Back to Top](#)

3. Basic Pilot Findings Released

Recent findings about the Web-based Basic Pilot program, now called E-Verify, have been released. Among other things, the new report notes that employers are satisfied with many aspects of the new online version of the former Basic Pilot program. Also, the accuracy of the U.S. Citizenship and Immigration Services (USCIS) database used for verification has "improved substantially" since the start of Basic Pilot. Further improvements are needed, however, the report notes, especially if the program is mandated nationally.

Most importantly, the report states, the database used for verification "is still not sufficiently up to date to meet the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996] requirement for accurate verification, especially for naturalized citizens." The report notes that USCIS and the Social Security Administration accommodate this problem by providing for a manual review of these cases, which is "time-consuming and can result in discrimination against work-authorized foreign-born persons during the period that the verification is ongoing, if employers do not follow procedures designed to protect employee rights."

E-Verify allows employers to get automated confirmation of a newly hired employee's work authorization after an Employment Eligibility Verification (Form I-9) has been completed. Employers who sign up to participate complete the I-9 process as usual, but then enter and submit I-9 information through a Web-based computer program to the Social Security Administration (SSA) database. If the SSA does not have sufficient information to confirm work authorization status, queries are sent to U.S. Citizenship and Immigration Services (USCIS) for confirmation. If more information is required to complete the confirmation process, the employer is asked to have the employee contact the SSA or USCIS to provide the needed information.

The report, which includes recommendations, is available at <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>. Related materials are available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=89abf90517e15110VgnVCM1000004718190aRCRD>.

[Back to Top](#)

4. Nonimmigrant Visa Delays Caused by Electronic Verification Requirement

According to a Department of State cable (No. 155679) sent to the field on November 13, 2007, consular posts are now able to access the details of approved nonimmigrant visa petitions in a new report called "PIMS" (Petition Information Management Service). The Kentucky Consular Center (KCC) has ceased e-mailing scanned copies of approved petitions to posts. The electronic PIMS record created by the KCC will now be the primary source of evidence to be used in determining petition approval. This applies to all nonimmigrant petition-based visa categories (H, L, O, P, and Q). The PIMS Petition Report contains a record of all petitioners recorded by the KCC as having approved petitions since 2004. In addition, many of the records contain information from KCC's Fraud Prevention Unit.

Reportedly, this unanticipated change has resulted in four-day delays at many posts from interview to visa issuance for these categories. The Academy of Business Immigration Lawyers is monitoring the situation.

[Back to Top](#)

5. DHS To Begin Requiring 10 Fingerprints at Ports of Entry

The Department of Homeland Security (DHS) is now requiring 10 fingerprints, instead of just two, from international visitors who fly into Washington Dulles International Airport. The US-VISIT requirement will be expanded to nine additional airports next spring:

- Boston Logan International Airport
- Chicago O'Hare International Airport
- Detroit Metropolitan Wayne County Airport
- Hartsfield-Jackson Atlanta International Airport
- George Bush Houston Intercontinental Airport

- Miami International Airport
- John F. Kennedy International Airport (NYC)
- Orlando International Airport
- San Francisco International Airport

By the end of 2008, the DHS plans to deploy the expanded fingerprint system to 107 other airports and to begin collecting 10 fingerprints at other ports of entry. The Department of State currently uses 10-fingerprint scanners at most of its visa-issuing posts and will complete deployment worldwide by the end of 2007.

[Back to Top](#)

6. DHS Converting Checks Into Electronic Transfers for I-765

The Department of Homeland Security is now converting funds from checks into electronic funds transfers for the Application for Employment Authorization (Form I-765). Checks should be made payable to "U.S. Department of Homeland Security." The DHS notes in the instructions to the form that "[y]ou will not receive your original check back. We will destroy your original check, but we will keep a copy of it. If the EFT [electronic funds transfer] cannot be processed for technical reasons, you authorize us to process the copy in place of your original check. If the EFT cannot be completed because of insufficient funds, we may try to make the transfer up to two times." In the past, sources noted, the receipt number could be retrieved from the cancelled check to track the application if the receipt got lost in the mail.

[Back to Top](#)

7. Department of State Issues Record Number of Student Visas

The Department of State announced on November 16, 2007, that it has issued a record number of visas to students coming to study in the U.S., exceeding pre-9/11 levels. During fiscal year 2007, the Department issued more than 651,000 student and exchange visitor visas, which was 10 percent more than last year and 90,000 more than were issued in fiscal year 2001.

The notice is available at
<http://www.state.gov/r/pa/prs/ps/2007/nov/95290.htm>.

[Back to Top](#)

8. ICE Nominee's Confirmation Is Uncertain in Senate

A confirmation vote in the Senate for Julie Myers to direct U.S. Immigration and Customs Enforcement (ICE) has not yet been scheduled. Concerns about her inexperience reportedly have subsided, but the outcome remains uncertain. Majority Leader Harry Reid (D-Nev.) continues to have concerns and is consulting with members before deciding how to proceed, according to a spokesperson. Ms. Myers recently found herself criticized for honoring an employee with a "Most Original Costume" award who was wearing a controversial costume at ICE's Halloween party.

[Back to Top](#)

9. Target and Whole Foods Market Charged with Discriminating Against Immigrant Workers

The Legal Aid Society - Employment Law Center (LAS-ELC) recently filed two employment discrimination charges with the Department of Justice against the Target Corporation and Whole Foods Market, alleging that the companies illegally fired and suspended, respectively, two immigrant workers, even though they had presented clear evidence of their authorization to work in the U.S. Target allegedly terminated an employee who is authorized to work under Temporary Protected Status (TPS), and Whole Foods allegedly suspended for 30 days without pay an employee who is a naturalized U.S. citizen.

"The facts could not show more clearly that both Target and Whole Foods Market engaged in classic document abuse, and our clients have suffered the harsh consequences of such illegality," said Carole Vigne, a Skadden Fellow with the LAS-ELC.

The LAS-ELC's announcement is available at <http://www.las-elc.org/whatsnew.html>.

This case is another illustration of what happens when an employer tries to follow the rules. Unfortunately, if you try too hard, you can get penalized.

[Back to Top](#)

10. State Dept. Issues Final Passport Rule

The Department of State has issued a final rule that reorganizes, restructures, and updates passport regulations. The Department said it issued the rule "to make [the regulations] easier for users to access information, to better reflect current practice and changes in statutory

authority, and to remove outdated provisions." In general, the Department said, the revisions do not mark a departure from current policy. Rather, the Department's intent is "to bring greater clarity to current passport policy and practice and to present it in a less cumbersome way."

The final rule, which includes comments and responses, is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-22461.pdf>. Because issues regarding passport fees and the passport card are addressed in a separate rulemaking, the Department said it will respond to comments on those issues at a later time.

[Back to Top](#)

11. China, India Second Preference Cut-Off Dates Retrogress; Other Projections

The Department of State's Visa Office announced in the latest Visa Bulletin that the China-mainland born and India employment second preference cut-off dates both will retrogress in December. The Department said the retrogression is a direct result of extraordinarily heavy applicant demand for numbers, primarily by U.S. Citizenship and Immigration Services offices for adjustment-of-status cases. Additional retrogressions cannot be ruled out during the second quarter of the fiscal year, which begins in January 2008, the Department noted.

The Department also made the following projections based on current demand patterns, which could change. "Under no circumstances should they be used as a basis for making any formal plans prior to the announcement of the monthly cut-off dates," the Department warned.

- Employment Preferences - Worldwide and Philippines:

First and second preferences: Will remain Current.

Third: Slow forward movement should be possible while demand patterns are established.

Third "Other Workers" category (all countries): Little if any forward movement is expected at this time. If the current demand pattern continues, it may be necessary to retrogress the cut-off date at some point later in the fiscal year.

- Employment Preferences - China-mainland born and India:

First: Continued heavy demand may require the establishment of a cut-off date at some point during the fiscal year.

Second: Demand during October and the first week of November has already used over 38 percent of the annual limit. It is hoped that the December retrogressions will return monthly number use within the target range. If not, further retrogressions cannot be ruled out.

The Visa Bulletin for December 2007 is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_3841.html.

[Back to Top](#)

12. Japan Begins Fingerprinting, Photographing Foreign Visitors

Japan has begun fingerprinting and photographing foreign visitors under new anti-terror legislation approved by Japan's upper house of parliament. Those refusing to comply will be denied admission into Japan and will be returned to their port of origin. The European Business Council in Japan and the Australian and New Zealand Chamber of Commerce in Japan sent a letter in October to the Justice Ministry expressing concerns about the new requirement. The letter is available at <http://www.ebc-jp.com/news/2007Oct%20Letter%20to%20Immigration%20Bureau%20E.pdf>.

[Back to Top](#)

New Publications and Items of Interest

[SEVIS Issues Quarterly Review](#). The Student and Exchange Visitor Information System (SEVIS) "General Data Quarterly Review" provides a snapshot of information intended for a variety of SEVIS stakeholders. The latest edition of the review includes information presented in charts and graphs from SEVIS data collected on October 1, 2007.

As of October 1, 2007, there were 1,045,918 active nonimmigrant students, exchange visitors, and their dependents in SEVIS. Data on schools, exchange visitor programs, and more than 4.7 million F, J, and M nonimmigrant visa international students and their dependents can be found in SEVIS.

The latest quarterly report is available at: http://www.ice.gov/doclib/sevis/pdf/quarterly_report_sept07.pdf.

DHS Releases Immigration Statistics. Updated immigration statistics are available on the Department of Homeland Security's Web site. Available reports include information on temporary admissions of nonimmigrants to the U.S., data on naturalizations and legal permanent residents, the *2006 Yearbook of Immigration Statistics*, and other topics.

The statistical reports are available at
<http://www.dhs.gov/ximgtn/statistics/>.

[Back to Top](#)

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

[Back to Top](#)

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