

LitwinLaw Update

August 1, 2010

Headlines:

- **1. ICE I-9 Final Rule Allows for Electronic Signatures, Scanning, Storage** - Employers and recruiters or referrers for a fee who are required to complete and retain the Employment Eligibility Verification Form may now sign the form electronically and retain it in an electronic format. Paper is no longer necessary.
- **2. American Immigration Lawyers Association Sues DHS, USCIS Over H-1B Transparency** - The FOIA litigation seeks documents on the government's H-1B visa review and processing procedures.
- **3. Decisions Not to Hire Persons Based on Need for Visa Sponsorship is OK, Justice Dep't Says** - Only certain classes of individuals are protected from citizenship status discrimination under the law, including U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents, refugees, and asylees.
- **4. State Dep't Explains Biometric Visa Program's Fingerscans, Photo Requirements** - Fingerscans and photos are generally required, with certain exceptions.
- **5. Preliminary Injunction Blocks Key Provisions of Arizona Immigration Statute** - A key portion of the new statute may conflict with a Supreme Court ruling that states cannot create their own immigration systems, a federal judge states; the New York City Bar calls the statute unconstitutional.
- **6. CBP Invites Comments on SENTRI and FAST Commercial Driver Applications** - U.S. Customs and Border Protection (CBP) has invited the public and other Federal agencies to comment on an information collection requirement concerning CBP's Trusted Traveler Programs. This program cuts down the time spent and waiting in line to enter the U.S.
- **7. U.S. Expands Appointment Scheduling for Nonimmigrant Visa Applicants in China** - Nonimmigrant visa applicants may now schedule interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live.
- **8. USCIS Clarifies 'O' Validity Period When Gap Exists in Itinerary, Promises 2-Week Turnaround for O and P Visas** - The memo notes that there is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event; USCIS dramatically lowered the expected turnaround time for O and P visas.
- **9. USCIS Extends Initial Registration Period for Haitian TPS, Extends TPS Designation for El Salvador** - The new notices extend the Haitian TPS registration period through January 18, 2011, and extends El Salvador's TPS designation through March 9, 2012.
- **10. USCIS Proposes New Standardized Fee Waiver Form** - USCIS has proposed for the first time a standardized fee waiver form, and seeks public comments.

- **11. Labor Dep't Launches National H-2A Electronic Job Registry** - The Employment and Training Administration launched a new National Electronic Job Registry for H-2A job orders on July 8, 2010.

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Details...

1. ICE I-9 Final Rule Allows for Electronic Signatures, Scanning, Storage

U.S. Immigration and Customs Enforcement (ICE) has issued a final rule, effective August 23, 2010, providing that employers and recruiters or referrers for a fee who are required to complete and retain the Employment Eligibility Verification Form (I-9) may sign the form electronically and retain it in an electronic format. The final rule makes minor changes to an interim final rule promulgated in 2006.

The final rule's supplementary information notes that the completed I-9 form is not filed with the Department of Homeland Security (DHS) but is retained by the employer, who must make it available for inspection upon a request by ICE investigators or other authorized federal officials. Employers must keep the I-9 in their own files for three years after the date of hire of the employee or one year after the date that employment is terminated, whichever is later. Recruiters or referrers for a fee must keep each I-9 for three years after the date of hire. Failure to properly complete and retain each I-9 may subject the employer or recruiter or referrer for a fee to civil money penalties.

Among other things, the final rule clarifies that:

- Employers must complete the I-9 within three business (not calendar) days;
- Employers may use paper, electronic systems, or a combination of paper and electronic systems;
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations;
- Employers need not retain audit trails recording each time an I-9 is electronically viewed, but only when the I-9 is created, completed, updated, modified, altered, or corrected; and

- Employers may provide or transmit a confirmation of an I-9 transaction, but are not required to do so unless the employee requests a copy.

The final rule, which includes "performance standards" for electronic filing processes and systems, is available at <http://edocket.access.gpo.gov/2010/pdf/2010-17806.pdf>.

2. American Immigration Lawyers Association Sues DHS, USCIS Over H-1B Transparency

The American Immigration Council's Legal Action Center (LAC) filed a lawsuit on July 20, 2010, against the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) on behalf of the American Immigration Lawyers Association (AILA), seeking the public release of records on agency policies and procedures for the H-1B visa program.

AILA had pursued disclosure of the documents through two Freedom of Information Act (FOIA) requests, both of which were denied. In its complaint filed in the U.S. District Court for the District of Columbia, AILA seeks the court's intervention to compel the government to release the requested records.

The FOIA litigation centers on the government's H-1B visa review and processing procedures. The H-1B program, administered by USCIS, allows U.S. businesses to temporarily employ foreign workers, such as scientists, engineers, and computer programmers, in occupations that require theoretical or technical expertise in specialized fields. Since 2008, the LAC noted, USCIS has implemented new, more stringent procedures for review and processing and has dramatically increased the frequency of unannounced H-1B worksite inspections, which are expected to reach 25,000 in 2010. Yet "USCIS has kept secret the rules and guidelines related to the review process," the LAC said. "The dearth of publicly available information on the government's heightened scrutiny of H-1B applications makes it particularly difficult for businesses to anticipate and meet agency expectations during the application process."

"It is in the public and the agency's interest to release the documents sought by AILA," said Mary Kenney, an attorney at the American Immigration Council's Legal Action Center. "The documents will help employers and foreign workers who seek immigration benefits comply with the law. Further, the agency violated FOIA when it issued wholesale denials of AILA's FOIA

requests." AILA is also represented in the litigation by Steptoe & Johnson LLP.

The announcement is available at <http://www.aila.org/content/default.aspx?docid=32657>.

3. Decisions Not to Hire Persons Based on Need for Visa Sponsorship is OK, Justice Dep't Says

Katherine A. Baldwin, Deputy Special Counsel for the Department of Justice's Civil Rights Division, noted in a recent letter that in general, decisions not to hire individuals based solely on their need for visa sponsorship or their need for a written employer submission to U.S. Citizenship and Immigration Services, either currently or in the future, would not be actionable under the antidiscrimination provisions of U.S. immigration law. She noted that only certain classes of individuals are protected from citizenship status discrimination under the law, including U.S. citizens, U.S. nationals, temporary residents, recent lawful permanent residents, refugees, and asylees.

The letter, sent on June 29, 2010, to Angelo Paparelli, partner in the Business Immigration Group of Seyfarth Shaw LLP, is available at <http://www.nationofimmigrants.com/wp-content/uploads/2010/07/OSC%20Reply%20on%20Proper%20Question%20on%20Job%20Application.pdf>.

4. State Dep't Explains Biometric Visa Program's Fingerscans, Photo Requirements

The Department of State has published a notice in the Federal Register that explains when fingerscans and other biometric identifiers are required, and notes exceptions to the general requirements.

The notice explains that the Enhanced Border Security and Visa Entry Reform Act of 2002 has required, since October 26, 2004, that all visas issued by the Department of State (DOS) must be machine-readable and tamper-resistant and use biometric identifiers. DOS determined, in consultation with the Departments of Homeland Security (DHS) and Justice (DOJ), that fingerprints and a photo image should be required as biometric identifiers. When the biometric visa program began, available technology allowed for the efficient capture and comparisons of only two fingerscans. As

a result of technological improvements, DOS instituted a 10-fingerscan standard.

DOS's Biometric Visa Program is a partner program to DHS' US-VISIT program in effect at U.S. ports of entry that uses the same biometric identifiers. The DOS notice explains that fingerscans and photos of visa applicants are sent to DHS databases. When a person to whom a visa has been issued arrives at a port of entry, his or her photo is retrieved from a database and projected on the computer screen of the U.S. Customs and Border Protection officer, who compares the person's fingerscans to the fingerscans in the database.

Certain exemptions to the fingerscans under the Biometric Visa Program have been coordinated with DHS to coincide with the exemptions to fingerscans under US-VISIT. Under the Biometric Visa Program, applicants for diplomatic or official visas, for visas to represent their governments at recognized international organizations such as the United Nations or for visas to serve as employees of such organizations, for NATO visas, or for government officials on official transit through the U.S. are exempt from the fingerscans. The aforementioned are represented by these visa categories: A-1, A-2, G-1, G-2, G-3, G-4, NATO-1, NATO-2, NATO-3, NATO-4, NATO-5, NATO-6 and C-3 (except for attendants, servants, or personal employees of accredited officials).

In addition, the notice states, persons under age 14 and persons age 80 or above are generally exempt from the fingerscans, unless the person is applying for a visa at a consular post in Mexico and in Yemen. In Mexico, fingerscans are required for applicants beginning at age 7 and above under the program for issuance of biometric Border Crossing Cards (commonly known as "laser visas"), which began in 1998. DOS recently expanded that policy to include visa applicants in Yemen, and may further expand it to include additional countries in the future. DOS retains the authority to require fingerscans of children under age 14 or adults age 80 or above in all other countries.

All visa applicants must submit a photograph with the visa application, the notice explains, except at consular posts in Mexico where most nonimmigrant visa applicants have a live-capture photo taken at the post. All persons, regardless of whether they submit fingerscans, are reviewed against the Department's facial recognition database.

The notice, published on July 8, 2010, is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16671.pdf>.

5. Preliminary Injunction Blocks Key Provisions of Arizona Immigration Statute

Following the Department of Justice's challenge to Arizona's recently passed immigration law, S.B. 1070, U.S. District Judge Susan Bolton of Phoenix, Arizona, issued a preliminary injunction against key provisions of the new statute. While not striking down the entire law, she blocked the provisions (1) requiring that an officer attempt to determine the immigration status of a person stopped, detained, or arrested if there is a "reasonable suspicion" that the person is unlawfully present, and requiring verification of the immigration status of any person arrested before release; (2) creating a crime for the failure to apply for or carry alien registration papers; (3) creating a crime for an unauthorized alien to solicit, apply for, or perform work; and (4) authorizing the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes him or her removable from the U.S.

Meanwhile, the New York City Bar Association issued a report concluding that the new law is unconstitutional under the Supremacy Clause and the First, Fourth, and Fourteenth Amendments.

The NYC Bar report notes that 10 states are currently contemplating similar legislation, including Utah, Georgia, Colorado, Maryland, Ohio, North Carolina, Texas, Missouri, Oklahoma, and Nebraska. The NYC Bar said that the substantive content of these state statutes, as manifested by S.B. 1070, "promotes racial profiling while infringing upon the exclusive role of the federal government to regulate immigration." The NYC Bar noted that the Arizona statute "adopts a parallel immigration enforcement program to the one maintained by the federal government through the pretext of conflating civil and criminal provisions of the Immigration and Nationality Act." At the same time, the NYC Bar said, "the statute fails on due process and Fourth Amendment grounds, in that it offers insufficient guidance to officials administering it as to when 'reasonable suspicions' of unlawful presence exist, and will target the foreign-born."

The report urged states to resist emulating Arizona's statute, and noted that "[f]ailure to enact comprehensive immigration reform is providing the fuel for states to overreach in this area of exclusive federal regulation."

The preliminary injunction is available at <http://images.bimedia.net/documents/SB1070-order.pdf>. A report on Judge Bolton's opinion is available at <http://www.latimes.com/news/nationworld/nation/la-na-arizona-immigration-20100723,0,3498774.story>. The New York City Bar report is available at <http://www.nycbar.org/pdf/report/uploads/20071951->

[ReportonArizonaImmigrationLawSB1070.pdf](#). The Justice Department's announcement is available at <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html>. Links to the complaint filed and other case documents are provided at the bottom of that page.

6. CBP Invites Comments on SENTRI and FAST Commercial Driver Applications

U.S. Customs and Border Protection (CBP) has invited the public and other Federal agencies to comment on an information collection requirement concerning CBP's Trusted Traveler Programs, including the Secure Electronic Network for Travelers Rapid Inspection (SENTRI), which allows expedited entry at specified southwest land border ports of entry, and the Free and Secure Trade program (FAST), which provides expedited border processing for known, low-risk commercial drivers.

The purpose of the Trusted Traveler programs, the notice explains, is to provide prescreened travelers expedited entry into the U.S. The benefit to the traveler is less time spent in line waiting to be processed by CBP.

Applicants may apply for these programs using paper forms available at <http://www.cbp.gov> or through the Global On-line Enrollment System (GOES) at <https://goes-app.cbp.dhs.gov>.

The notice, published on July 6, 2010, is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16314.pdf>.

7. U.S. Expands Appointment Scheduling for Nonimmigrant Visa Applicants in China

Nonimmigrant visa applicants may now schedule interview appointments at any U.S. Consular Section in China, regardless of the province or city where they live. Consular Sections are located at the U.S. Embassy in Beijing and U.S. Consulates General in Chengdu, Guangzhou, Shanghai, and Shenyang. The U.S. Embassy in Beijing noted that although the basic application process is the same, specific times and application procedures at each visa issuing office may vary. Before applying for a visa, applicants should check each post's Web site for procedures specific to that post. In 2009, the U.S. Embassy in Beijing noted, almost half a million people received nonimmigrant visas in China.

The notice is available at http://beijing.usembassy-china.org.cn/visa_interview_appointment_availability.html. Information about making an appointment is available at http://beijing.usembassy-china.org.cn/niv_appointment.html.

8. USCIS Clarifies 'O' Validity Period When Gap Exists in Itinerary

There have been several recent developments with respect to O and P visas:

On July 20, 2010, U.S. Citizenship and Immigration Services (USCIS) issued clarifying guidance on the "O" nonimmigrant visa petition with regard to determining the appropriate validity period of an approvable petition when a gap exists between two or more events reflected in the itinerary.

The memo explains that the validity dates for the O-1 visa classification are defined by the specific period of time required to perform or participate in a specific event. When reviewing an O-1 petition, the length of time between the scheduled events, also known as a gap, has sometimes been viewed as a gauge to determine whether an itinerary represented one continuous "event" or separate events requiring separate petitions.

In certain cases where there has been a significant gap between events, adjudicators have sometimes concluded that a single petition was filed for separate events rather than a continuous event. In such cases, the petition may have been approved only for a validity period equal to the length of time needed to accomplish what appeared to be the initial specific event rather than the continuous event as represented by the petition.

The memo notes that there is no statutory or regulatory authority for the proposition that a gap of a certain number of days in an itinerary automatically indicates a new event. "The regulations speak in terms of tours and multiple appearances as meeting the 'event' definition." The statutory and regulatory background provides flexibility on the length of validity period that may be granted, the memo states:

"The statute and regulations allow for an approval of an O-1 petition for a period necessary to accomplish the event or activity, not to exceed 3 years. Adjudicators should evaluate the totality of the evidence submitted to determine if the activities described in the itinerary are related in such a way that they would be considered an 'event' for purposes of the validity period. When the validity period requested is established through the submission of appropriate

evidence, Service Centers should approve a petition for the length of the validity period requested where the law and regulations permit."

The memo is available at

http://www.uscis.gov/USCIS/Laws/Memoranda/2010/July/guidance-O-petition-gap_memo-07-20-10.pdf.

In other news, USCIS promised during a public meeting with stakeholders on July 20, 2010, that processing times for regularly filed O and P visas for performers and athletes will not exceed 14 days. In some previous cases, adjudications reportedly have taken up to four months, and delays have led to last-minute scrambles and missed performances. Although arts groups say more needs to be done, many were hopeful about this recent development. The Performing Arts Alliance said it was "extremely pleased with this week's breakthrough."

For more, see <http://www.nytimes.com/2010/07/23/arts/music/23visa.html> and <http://www.tcg.org/advocacy/alert.cfm>.

9. USCIS Extends Initial Registration Period for Haitian TPS, Extends TPS Designation for El Salvador

On January 21, 2010, the Department of Homeland Security (DHS) designated Haiti under the temporary protected status (TPS) program for a period of 18 months. DHS initially established a 180-day registration period from January 21, 2010, through July 20, 2010. A new notice extends the TPS registration period through January 18, 2011.

Also, USCIS extended the designation of El Salvador for TPS for 18 months, from its current expiration date of September 9, 2010, through March 9, 2012. The notice also sets forth procedures necessary for nationals of El Salvador (or those having no nationality who last habitually resided in El Salvador) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with USCIS. Re-registration is limited to persons who previously registered for TPS under the designation of El Salvador and whose applications have been granted or remain pending. Certain nationals of El Salvador (or those having no nationality who last habitually resided in El Salvador) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

New EADs with a March 9, 2012, expiration date will be issued to eligible Salvadoran TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration

applications, USCIS said it recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on September 9, 2010. Accordingly, the notice automatically extends the validity of EADs issued under the TPS designation of El Salvador for six months, through March 9, 2011, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

The 60-day re-registration period for eligible Salvadorans begins July 9, 2010, and will remain in effect until September 7, 2010.

The Haitian notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-17116.pdf>. The Salvadoran notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16431.pdf>. A Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=9fc4a93adb7b9210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

10. USCIS Proposes New Standardized Fee Waiver Form

U.S. Citizenship and Immigration Services (USCIS) has proposed for the first time a standardized fee waiver form. USCIS seeks public comments on the proposed new Form I-912, Request for Individual Fee Waiver.

Details and instructions for responding to the request for comments are available at <http://edocket.access.gpo.gov/2010/pdf/2010-17114.pdf>. The proposed form is available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b1a9c1>. More information is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=0fb5ac6b49cd9210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A related fact sheet is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2e15ac6b49cd9210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

11. Labor Dep't Launches National H-2A Electronic Job Registry

The Department of Labor's Employment and Training Administration (ETA) launched a new National Electronic Job Registry for H-2A job orders on July

8, 2010. Under a final rule published in February 2010, the agency must post all job orders filed in connection with H-2A applications until the end of 50 percent of the contract period. This requirement, the notice explains, is intended to "improve the transparency of agricultural jobs available to U.S. workers and provide an unprecedented level of public access to one of the most frequently requested types of records maintained by the Department."

The job order information is searchable by common data points such as case number, employer name, area of intended employment, work contract period, job title, and primary crop or agricultural activity. All search results are displayed in a table format with sortable column headers. The public is able to view a summary of the job order as well as download a copy of the entire job order and all attachments in Adobe PDF format.

The Office of Foreign Labor Certification (OFLC) noted that since March 15, 2010, it has received more than 620 H-2A applications requesting nearly 11,000 workers. Approximately 450 active H-2A job orders are available to the public.

Public access to the job registry is available through the OFLC iCERT Visa Portal System at <http://icert.doleta.gov>. Questions related to job orders placed on the H-2A job registry may be e-mailed to H-2Ajobregistry.chicago@dol.gov. This H-2A job registry Help Desk e-mailbox is monitored from 8:30 a.m. to 5 p.m. Central Time, Monday through Friday. Members of the public may also call the job registry Help Desk at (312) 886-8000 (not toll-free).

The notice, which was published on July 1, 2010, and includes additional details about how the registry will be updated, is available at <http://edocket.access.gpo.gov/2010/pdf/2010-16011.pdf>. A fact sheet is available at http://www.foreignlaborcert.doleta.gov/pdf/H2A_JobRegistry_Factsheet.pdf.

New Publications and Items of Interest

Federal Register changes. The Office of the Federal Register (OFR) and the Government Printing Office (GPO) are moving the Federal Register home page and the Public Inspection Desk to <http://www.OFR.gov>. Please reset your bookmarks before July 26, 2010. The OFR said this change is necessary to make way for a new edition of the daily Federal Register, an unofficial "Web 2.0" prototype, which will be hosted on <http://FederalRegister.gov>.

The Federal Register home page on <http://www.OFR.gov> will continue to feature the electronic Public Inspection Desk (<http://www.ofr.gov/inspection.aspx>), the Privacy Act Issuances for 2007 and 2009 (<http://www.ofr.gov/Privacy/AGENCIES.aspx>), and the OFR Catalog, which links to all Federal Register publications and services.

As of July 26, 2010, the FederalRegister.gov Web site displays an XML prototype of the daily Federal Register. It is not an official legal edition of the Federal Register, the OFR said, and does not replace the official (print or electronic) version on GPO's Federal Digital System (<http://www.FDsys.gov>). OFR and GPO are posting the unofficial XML prototype of the Federal Register to gather public feedback, with the aim of granting it official status in the future. It will remain an unofficial informational resource until the Administrative Committee of the Federal Register issues a regulation granting it official legal status.

A related news report is available at <http://www.federalnewsradio.com/?nid=35&sid=2004175>.

SEVIS quarterly update. The Student and Exchange Visitor Information System (SEVIS) has released a general summary quarterly review. The report notes that since the program's inception, the total volume of data in SEVIS continues to grow. On June 30, 2010, SEVIS contained records for 1,084,122 active nonimmigrant students, exchange visitors, and their dependents. The total number of records for all F-1, M-1, and J-1 visa holders has increased to approximately 7.6million.

The report is available at http://www.ice.gov/doclib/sevis/pdf/quarterly_report_ending_june2010.pdf.

Visa number allotments and the cut-off date process. The Department of State's Visa Office has released "The Operation of the Immigrant Numerical Control System," which explains how immigrant visas subject to numerical limitations are allotted and the determination of cut-off dates for the Visa Bulletin. The document, which also clarifies some frequently misunderstood points, is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

Immigration statistics Web redesign. The Department of Homeland Security's Office of Immigration Statistics (OIS) has recently restructured its Web site. After reviewing user feedback, OIS implemented a new design that organizes reports and data by subject area, as opposed to product type, and that is intended to allow users more efficient access to immigration reports and data. The new site is available at <http://www.dhs.gov/files/statistics/immigration.shtm>.

USCIS Ombudsman releases annual report to Congress. The U.S. Citizenship and Immigration Services' (USCIS) Ombudsman, January Contreras, recently submitted the 2010 Annual Report to Congress. Challenges identified by the Ombudsman include declining receipts and revenue; antiquated technology and case management systems; employment and family green card queues; issues with requests for evidence; and other issues. The report includes recommendations to address these and other challenges.

The report is available at

http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.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/processTimesDisplay.do>

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/bulletin/bulletin_1360.html
