

LitwinLaw Update

May 1, 2008

Headlines:

- **1. H-1B Roundup: Cap Reached, Random Selection Completed; Some Applications 'Wait-Listed'** - USCIS announced a preliminary number of nearly 163,000 H-1B petitions received during the filing period ending on April 7, 2008. Most of the winning premium processing cases have been adjudicated.
- **2. DHS Issues Interim Rule on Optional Practical Training for F-1 Students** - DHS issued an interim final rule extending the maximum period of OPT from 12 to 29 months for F-1 students who have completed a STEM degree and accept employment with employers enrolled in E-Verify. Maybe a reason to enroll in an otherwise flawed program.
- **3. USCIS Revises I-765 To Add F-1 Eligibility Codes** - USCIS has revised the Application for Employment Authorization to include additional eligibility codes under the DHS' interim final rule regarding OPT.
- **4. DOS Issues Annual Guidance on Students and Exchange Visitors** - The Department of State has released a cable regarding student (F and M) and exchange visitor (J) issues.
- **5. USCIS Releases Processing Times for Naturalization Applications Filed During Summer 2007** - Projected processing times at the end of September 2008 range from a high of 14.7 months for Washington, D.C., to a low of 5 months for Helena, Montana. Unfortunately, forum shopping is not allowed!
- **6. DHS Proposes Biometrics Airport and Seaport Exit Procedures** - The US-VISIT exit proposal would require non-U.S. citizens who provide biometrics identifiers for admission to provide digital fingerprints when departing the country from any air or sea ports of departure.
- **7. ICE Arrests Hundreds of Workers** - In April, ICE agents arrested hundreds of undocumented workers, including more than 300 workers at Pilgrim's Pride plants in five states who are suspected of committing identity theft and other criminal violations to obtain their jobs.

- **8. DHS Signs Visa Waiver Agreement With Korea** - The security enhancements outlined in the agreement put Korea on the path toward visa-free travel to the U.S. and potential designation as a VWP member as early as later this year.
- **9. House Holding Series of Immigration Hearings** - An oversight hearing on the H-2B program was the first in a series of immigration hearings to be held by the House immigration subcommittee and the full Judiciary Committee.
- **10. Expensive Virtual Border Fence To Be Replaced** - Customs and Border Protection officials recently acknowledged that the "Project 28" pilot program is not working sufficiently.

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Details...

1. H-1B Roundup: Cap Reached, Random Selection Completed; Some Applications 'Wait-Listed'

U.S. Citizenship and Immigration Services (USCIS) announced on April 8, 2008, that it had received enough H-1B petitions to meet the congressionally mandated cap for fiscal year (FY) 2009. USCIS announced a preliminary number of nearly 163,000 H-1B petitions received during the filing period ending on April 7, 2008. More than 31,200 of those petitions were for the advanced degree exemption. On April 14, USCIS conducted the computer-generated random selection process to select which H-1B petitions for FY 2009 will continue to full adjudication. If approved, those H-1B petitions will be eligible to receive an H-1B visa number.

USCIS conducted two random selections, first on petitions qualifying for the 20,000 "master's or higher degree" (advanced degree) exemption, and second on the remaining advance degree petitions together with the general H-1B pool of petitions, for the 65,000 cap.

The approximately 163,000 petitions received on the first five days of the eligible filing period for FY 2009 (April 1 through April 7, 2008) were labeled with unique numerical identifiers. USCIS has notified the appropriate service centers which numerical identifiers have been randomly selected, so each center may continue processing the petitions associated with those identifiers.

Petitioners whose properly filed petitions have been selected for full adjudication should receive a receipt notice dated no later than June 5, 2008, according to California Service Center, at a meeting I attended on April 30, 2008. USCIS will return unselected petitions with the fee(s) to petitioners or their authorized representatives. As previously announced, duplicate filings will be returned without the fee. The total adjudication process is expected to take approximately eight to 10 weeks.

For cases selected through the random selection process and initially filed for premium processing, the 15-day premium processing period began on April 14, the day of the random selection process. California Service Center has either completed processing of these cases or have sent RFEs.

USCIS has "wait-listed" some H-1B petitions, meaning they could replace petitions chosen to receive an FY 2009 cap number but that subsequently are denied, withdrawn, or otherwise found ineligible. USCIS will retain these petitions until a decision is made whether they will replace a previously selected petition. USCIS said it will send a letter to the wait-list petitioners to inform them of their status. USCIS expects that for each of these wait-listed petitions, it will either issue a receipt notice or return the petition with fees by early to mid-June.

USCIS also announced that, with several exceptions, it will not reject an H-1B petition subject to the fiscal year 2009 cap solely on the grounds that it was received at the wrong service center (e.g., the petition may have been inadvertently mailed to the California Service Center instead of the Vermont Service Center or vice versa). This does not apply if the petitions were sent to the Texas or Nebraska Service Centers.

USCIS said it was taking this "limited, short-term measure to alleviate concerns from the public where an H-1B petition has been received by USCIS but at the incorrect Service Center." This measure applies only to H-1B petitions subject to the FY 2009 cap that were received by USCIS before the close of business on the final receipt date.

California Service Center confirmed that their target is do adjudicated non-premium processing H-1 petitions within 60 days after the date the petition is fee'd in.

The announcement that the H-1B cap has been reached is available at http://www.uscis.gov/files/article/H-1B_8Apr08.pdf. The announcement about the random selection process is at http://www.uscis.gov/files/article/Update_USCIS_Runs_H1-B_Random_Selection%20Process.pdf. The announcement of the preliminary number of H-1B petitions received is at

http://www.uscis.gov/files/article/USCIS%20Update_H1B_Preliminary%20Count1_10Apr08.pdf. The announcement about USCIS' policy regarding receipt at the wrong service center is at http://www.uscis.gov/files/article/H-1B_Filing_4Apr08.pdf.

2. DHS Issues Interim Rule on Optional Practical Training for F-1 Students

The Department of Homeland Security (DHS) issued an interim final rule, effective April 8, 2008, that extends the maximum period of optional practical training (OPT) from 12 months to 29 months for F-1 students who have completed a science, technology, engineering, or mathematics (STEM) degree and accept employment with employers enrolled in U.S. Citizenship and Immigration Services' (USCIS') E-Verify employment verification program. Currently, F-1 students who have been enrolled on a full-time basis for at least one full academic year in a Student and Exchange Visitor Program (SEVP)-certified college, university, conservatory, or seminary are eligible for 12 months of OPT to work for a U.S. employer in a job directly related to the student's major area of study.

The interim rule requires F-1 students with an approved OPT extension to report changes in the student's name or address and in the employer's name or address, and periodically to verify the accuracy of this information. The rule also requires the employers of F-1 students with an extension of post-completion OPT authorization to report to the student's designated school official (DSO) within 48 hours after the OPT student has been terminated from, or otherwise leaves, his or her employment with that employer before the end of the authorized period of OPT. The interim final rule also implements a programmatic change to allow students to apply for OPT within 60 days of finishing their studies.

USCIS said the interim rule ameliorates the so-called "cap-gap" problem by extending the authorized period of stay for all F-1 students who have a properly filed H-1B petition and change of status request (filed under the cap for the next fiscal year) pending with USCIS. If USCIS approves the H-1B petition, the students will have an extension that enables them to remain in the U.S. until the requested start date as indicated in the H-1B petition takes effect.

The interim rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf>. A 30-page SEVP policy guidance document on post-completion OPT has been posted at http://www.ice.gov/doclib/sevis/pdf/opt_policy_guidance_pdf.pdf. Information about E-Verify is at <http://www.dhs.gov/e-verify>.

3. USCIS Revises I-765 To Add F-1 Eligibility Codes

U.S. Citizenship and Immigration Services (USCIS) announced on April 24, 2008, that it has revised the Application for Employment Authorization (Form I-765) to include additional eligibility codes under the Department of Homeland Security's interim final rule regarding Optional Practical Training (OPT), published on April 8, 2008. The rule modifies the conditions and duration of OPT for qualified F-1 nonimmigrant students.

USCIS will accept the July 30, 2007, edition of the form through July 8, 2008. As of July 9, USCIS will only accept the revised Form I-765, dated April 4, 2008, and will reject all requests using previous editions of the form.

USCIS' announcement is available at http://www.uscis.gov/files/article/I-765_24Apr08.pdf. The OPT interim rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf>. The revised I-765 is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=73ddd59cb7a5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD>.

4. DOS Issues Annual Guidance on Students and Exchange Visitors

The Department of State has released a cable sent to the field on March 11, 2008, regarding student (F and M) and exchange visitor (J) nonimmigrant visa issues. Among other things, the cable notes that first-time visa applicants may be the highest priority when scheduling appointments, and repeat applicants may be scheduled on a lower-priority tier. The cable also clarifies some information on the DS-2019 form, and discusses new Exchange Visitor Program (EVP) sanctions regulations and new Termination of Designation and Revocation of Program regulations, which took effect January 22, 2008. Specifically, some of the major changes in the sanction and termination process include:

- Sponsors who were at risk of losing their program designations will have their cases heard through a paper review instead of an in-person review.
- A revised suspension process will freeze sponsors' operations for 120 days while their qualifications are under review.
- A new provision allows the Department to terminate an entire class of designated exchange visitor program sponsors if it believes specific programs, sponsors, exchange visitor category(ies), and/or activities

compromise the national security of the U.S. or no longer further the Department's public diplomacy mission.

- Sponsors on whom the Bureau of Educational and Cultural Affairs imposes lesser sanctions are no longer allowed to appeal.

The cable is available at

http://travel.state.gov/visa/laws/telegrams/telegrams_4202.html. Additional information about the J exchange visitor program is available at <http://exchanges.state.gov/education/jexchanges/>. Statistics and data tables about foreign students and exchange visitors are available at <http://opendoors.iienetwork.org/>.

5. USCIS Releases Processing Times for Naturalization Applications Filed During Summer 2007

U.S. Citizenship and Immigration Services (USCIS) has released the projected times for local offices to complete processing of citizenship applications filed during the summer of 2007. Projected processing times at the end of September 2008 range from a high of 14.7 months for Washington, D.C., to a low of 5 months for Helena, Montana.

Last July, USCIS received 460,000 applications for naturalization, which was three times the record for any previous month. For the year, USCIS received 1.4 million naturalization applications, almost double the normal annual volume.

USCIS said it is hiring and training hundreds of additional immigration officers to adjudicate these cases. The agency is also conducting naturalization interviews on weekends, after normal business hours, and in additional locations.

The processing times, USCIS said, "provide a sense of how quickly a case may be processed if there are no complicating factors," noting that some cases will take longer to complete; for example, if an applicant has been asked to submit additional information or fails the naturalization test, or if the FBI name check is in progress.

The projected processing times are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=2de02ad51e679110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

6. DHS Proposes Biometrics Airport and Seaport Exit Procedures

The U.S. Department of Homeland Security (DHS) proposed a rule on April 22, 2008, that would establish biometrics exit procedures at all U.S. air and sea ports of departure. The majority of non-U.S. citizens and non-permanent residents, except for Canadians, are already required to submit digital fingerprints and a digital photograph for admission into the country. The US-VISIT exit proposal would require non-U.S. citizens who provide biometrics identifiers for admission to provide digital fingerprints when departing the U.S. from any air or seaports of departure.

The DHS said that visitors departing the U.S. should continue to return their paper Form I-94 or Form I-94W to airline or ship representatives. The DHS completed a test of biometrics exit procedures at several U.S. airports and seaports last year. Based on the results, the DHS determined that biometrics exit procedures must be integrated into the existing traveler process to ensure compliance and provide visitors with a consistent experience from port to port.

The proposed rule would require commercial air carriers and cruise line owners and operators to collect and transmit international visitors' biometrics information to DHS within 24 hours of leaving the U.S. Carriers are already required to transmit biographic information to DHS for all passengers before their departure from the U.S. The proposed rule does not designate a specific location within the port of departure for biometrics collection and does not apply to small carriers or vessel owners and operators, or to general aviation.

The rule proposes a performance standard that requires the carriers to collect biometrics information on the premises of the facility from which the passenger departs the U.S., but provides the carriers with some discretion in the manner of collection and submission to allow the carriers to meet the requirements in the most efficient and cost-effective manner.

The DHS requests public comments on all of the alternatives discussed in the proposed rule and the underlying assumptions and analyses. Although the proposed rule identifies means for collection of biometrics, personnel, and methods of transmission, the agency said it also welcomes proposals on alternatives that have not been proposed in the rule. The most useful proposals or alternatives, the DHS said, would include information on how the proposed alternative would reduce the burden on travelers and the travel industry without sacrificing accuracy in the collection of biometrics information.

The DHS intends to implement air and sea biometrics exit procedures by January 2009, fulfilling a key provision of the Implementing the Recommendations of the 9/11 Commission Act of 2007. The DHS said the proposed rule would enable the DHS to retain the necessary authority to manage the Visa Waiver Program effectively. If the exit program has not been implemented by June 30, 2009, the department may not be able to extend Visa Waiver Program privileges to new countries. The agency said the waiver authority is critical for the U.S. to invite more of its allies to participate in the Visa Waiver Program.

Comments may be submitted via:

- **Federal Rulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received must include the agency name and docket number (DHS-2008-0039) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.
- **Mail:** Written comments may be submitted to: Michael Hardin, Senior Policy Advisor, US-VISIT, Department of Homeland Security; 1616 North Fort Myer Drive, 18th Floor, Arlington, Virginia 22209. Submissions must include the agency name and docket number (DHS-2008-0039).

The proposed rule was published in the *Federal Register* at <http://edocket.access.gpo.gov/2008/pdf/E8-8956.pdf>. Following the 60-day public comment period and review, a final rule will be published outlining the new requirements and their effective date.

Meanwhile, Sen. Patrick Leahy (D-Vt.) held an oversight hearing on the Department of Homeland Security. The sole witness was Secretary Michael Chertoff. Among other things, Sen. Leahy discussed his concerns about the Department's implementation of the Western Hemisphere Travel Initiative. "The Department must now make good use of the time Congress has given to make sure that implementation goes smoothly, and to minimize disruption in Americans' lives and in our relationships with our good neighbors to the north and south," he said. Sen. Leahy added that "I also share the view of many on both sides of the aisle and across the country about the so-called REAL ID Act and its unfunded mandates for States." In advance of the hearing, Sen. Leahy said, "The good news is that the Bush administration will not fight the new law that moves the passport requirement to next year. The bad news is that there is little reason to believe DHS will be ready even then." Statements from Sen. Leahy and

Secretary Chertoff are available at
<http://judiciary.senate.gov/hearing.cfm?id=3226>.

7. ICE Arrests Hundreds of Workers

In April, U.S. Immigration and Customs Enforcement (ICE) agents arrested hundreds of undocumented workers, including more than 300 workers at Pilgrim's Pride poultry plants in five states who are suspected of committing identity theft and other criminal violations to obtain their jobs.

ICE special agents also detained 45 undocumented workers at 10 sites and arrested 11 individuals for conspiring to harbor undocumented workers who were smuggled into the U.S. to work in Mexican restaurants in four states. This operation involved approximately 130 ICE agents and 30 state and local law enforcement officers and began in May 2006.

ICE agents interviewed roughly 100 employees at a resort in Leesburg, Virginia. Agents arrested 53 immigration status violators and another six were apprehended outside the facility. The 59 workers are nationals of El Salvador, Guatemala, Mexico, Honduras, Bolivia, Peru, and Argentina. All face removal proceedings.

Details on the arrests are available at
<http://www.dhs.gov/ximgtn/enforcement/>.

8. DHS Signs Visa Waiver Agreement With Korea

On April 18, 2008, Department of Homeland Security (DHS) Secretary Michael Chertoff signed a Visa Waiver Program (VWP) Memorandum of Understanding (MOU) with Korean Minister of Foreign Affairs and Trade Yu Myung-hwan. The security enhancements outlined in the agreement "put [] Korea on the path toward visa-free travel to the U.S., and potential designation as a VWP member as early as later this year," the DHS announcement states.

The DHS said it plans to establish an electronic system of travel authorization for air passengers. VWP travelers will be asked to provide some basic information online, which will generate an authorization number for travel. The agency said it will announce details on how the authorization systems will work, and when they will begin, later this year.

The VWP has 27 current members from Asia and Europe. The U.S. has signed enhanced VWP agreements with the Czech Republic, Estonia, Latvia, Slovakia, Hungary, Lithuania and Malta in recent weeks. Each country has committed to meeting the new security requirements of the program.

The announcement is at
http://www.dhs.gov/xnews/releases/pr_1208545066700.shtm.

9. House Holding Series of Immigration Hearings

House Judiciary Committee Chairman John Conyers, Jr. (D-Mich.), and chairwoman of the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Rep. Zoe Lofgren (D-Cal.), announced that an oversight hearing held April 16, 2008, on the H-2B program was the first in a series of immigration hearings to be held by the subcommittee and the full Judiciary Committee.

"Over the past year, it has become clear that we need an immigration system that is fair, legal, and tough," said Rep. Conyers. The series will be conducted in coordination with several other House committees.

The Judiciary Committee's announcement is available at <http://judiciary.house.gov/newscenter.aspx?A=954>. Testimony from the H-2B hearing has been posted to the House Web site (<http://judiciary.house.gov/oversight.aspx?ID=432>). Testimony has been posted (<http://judiciary.house.gov/oversight.aspx?ID=435>) for a hearing on wasted visas and growing backlogs held on April 30, 2008.

10. Expensive Virtual Border Fence To Be Replaced

Just two months after Secretary of Homeland Security Michael Chertoff accepted the Boeing Co.'s completed \$20 million virtual fence along portions of the border with Mexico, the agency announced it will replace the Arizona-Mexico virtual fence with new radios, cameras, towers, and computer software. Customs and Border Protection officials recently acknowledged that the "Project 28" pilot program is not working sufficiently. Border Patrol agents in the Tucson sector agreed with Boeing's conceptual design of Project 28 but said the final system might have been more useful if they and others had been given an opportunity to provide feedback throughout the process, according to a Government Accountability Office (GAO) report issued in February 2008.

An article about plans to replace the virtual fence is available at http://www.govexec.com/story_page.cfm?articleid=39838&dcn=e_gvet. A GAO report on border security, issued in March 2008, is available at <http://www.gao.gov/new.items/d08542t.pdf>. The GAO report issued in February 2008, detailing some of the problems with the virtual fence program, is available at <http://www.gao.gov/new.items/d08508t.pdf>.

New Publications and Items of Interest

How immigration is saving Social Security. The *New York Times* published an editorial on April 2, 2008, "How Immigrants Saved Social Security." The editorial argues that undocumented immigration has had an even better effect on Social Security than legal immigration. The editorial is available at http://www.nytimes.com/2008/04/02/opinion/02wed3.html?_r=2&ref=opinion&oref=slogin&oref=slogin.

2007 LPR statistics. The Department of Homeland Security has posted online the *Annual Flow Report: U.S. Legal Permanent Residents: 2007*, published March 2008. The Office of Immigration Statistics report presents information, obtained from applications for lawful permanent resident (LPR) status, on the number and characteristics of persons who became LPRs in the U.S. during 2007.

The report notes that employment-based immigrant preference categories, including principals and their dependents, represented 15 percent of the total LPR flow in 2007, up from 13 percent in 2006. The LPR flow for employment preferences increased 2 percent from 159,081 in 2006 to 162,176 in 2007, but was below the record of 246,877 set in 2005. The large number of LPRs in the employment preferences in 2005 was primarily due to the American Competitiveness in the 21st Century Act of 2000 (AC21). This Act resulted in the recapture of 130,107 unused employment-based visa numbers from 1999 and 2000 to be made available to first, second, and third preference employment-based immigrants once the annual limit had been reached. Approximately 94,000 of those recaptured visa numbers were used in 2005, none were used in 2006, and 7,312 were used in 2007.

In addition, provisions of the REAL ID Act of 2005 resulted in the recapture of 50,000 unused employment-based visas from 2001 to 2004, of which 11,950 were used in 2005, 33,335 were used in 2006, and 4,743 were used in 2007. The number of employment-based LPRs for 2007 includes 10,849 recaptured REAL ID visas. The majority of these visas were issued to individuals whose country of origin was the Philippines (64 percent) or India (21 percent). As a result of the use of additional visas recaptured by provisions of the AC21 and the REAL ID Act, the number of employment-based preferences in 2007 was greater than the annual limit of 147,148.

The report is available at

http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf

Drew Carey video. "The Beckham Factor," a video clip from Drew Carey about U.S. attitudes toward immigration, is available at <http://www.truthinimmigration.org/CompleteStory.aspx?sid=25>.

Immigration dashboard for human resource professionals. Angelo Paparelli, President of the Alliance of Business Immigration Lawyers, has written an article with Lily S. Hensel, "An Immigration Dashboard for Human Resource Professionals." The article provides employers with key "dashboard" elements:

- Practical information concerning basic principles of work-related immigration law
- Eligibility criteria for the most popular work-visa categories
- Best practices when hiring or continuing to employ foreign and domestic workers
- Recommended procedures to follow after receipt of a "no-match" letter
- Useful tips to make sure that foreign workers maintain lawful immigration status throughout the employment relationship and are not prevented from working by delayed security clearances or restrictions on travel abroad and reentry to the United States
- Guidance on ways to limit or minimize liability, or negative, unintended immigration-related outcomes affecting the workforce and the employment relationship

The article is available at

<http://www.abil.com/articles/Immigration%20Dashboard%20for%20HR%20Professionals.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