

LitwinLaw Update

June 1, 2008

Headlines:

- **. DHS Issues Supplemental Q&A on OPT Interim Rule for F-1 Students** - Among other things, the supplemental Q&A discusses the e-mail notification process allowing an employer whose pending H-1B petition on behalf of an F-1 student was randomly selected to receive an H-1B visa number for FY 2009 to request change of status in lieu of consular processing, as originally indicated on the petition.
- **2. E-Verify Update: Naturalization, Arrival Data Incorporated** - A series of enhancements to E-Verify are intended to improve the accuracy of the system's automatic confirmation processes. USCIS continues to try to improve the system.
- **3. USCIS Plans to Propose Halting Concurrent I-140, I-485 Filings** - USCIS plans to propose disallowing concurrent filings of the Application to Register Permanent Residence or Adjust Status with the Immigrant Petition for Alien Worker.
- **4. USCIS Announces Proposed Rule To Increase Periods of Stay for TN Professionals From Canada, Mexico** - The proposal would extend the maximum period of admission for Trade NAFTA workers from one year to three years. This change would reduce time and costs associated with an annual renewals.
- **5. Arizona Governor Signs Bill Amending Arizona Workers Act, Vetoes Bill Requiring Local Immigration Enforcement** - An Arizona employer's business license may not be suspended or revoked if an employee hired before January 1, 2008, is an undocumented worker.
- **6. Largest-Ever Immigration Raid Results in Nearly 400 Arrests, Lawsuit** - Almost 400 people were arrested at Agriprocessors in Postville, Iowa.
- **7. Laptops, Storage Devices May Undergo Scrutiny At Border** - The Ninth Circuit Court of Appeals held that the federal government has discretion to search a laptop or other personal electronic storage device at the border.

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Details...

1. DHS Issues Supplemental Q&A on OPT Interim Rule for F-1 Students

The Department of Homeland Security (DHS) issued supplemental questions and answers (Q&A) on 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 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.

Among other things, the supplemental Q&A notes that on April 18, 2008, USCIS announced an e-mail notification process allowing a petitioner whose pending H-1B petition on behalf of an F-1 student was randomly selected to receive an H-1B visa number for fiscal year (FY) 2009 to request change of status in lieu of consular processing, as originally indicated on the petition. Because some FY 2009 H-1B petitions for these students already may have been approved for consular processing when USCIS published this e-mail notification process, the Q&A asks: Can the petitioner still request change of status? The answer is yes. The Q&A states that the petitioner should send an e-mail to the USCIS service center that issued the approval, using the designated e-mail address (below). Such requests must include the H-1B receipt number, as well as the petitioner's and the beneficiary's names.

If the H-1B petition and change of status application are pending, the change of status request should be submitted to the center within 30 days of the receipt notice. In addition to including the receipt number and the name of the petitioner and beneficiary, the Q&A notes, the request also should include the beneficiary's date of birth, I-94 (Arrival/Departure Record) number, and Student and Exchange Visitor Information System (SEVIS) number.

Separate e-mail addresses have been established for premium and non-premium processing cases:

Vermont Service Center

Premium processing cases: VSCPPCAPGAP.Vscppcapgap@dhs.gov

Non-premium cases: VSCNONPPCAPGAP.Vscnonppcapgap@dhs.gov

California Service Center

Premium processing cases: CSC.ppcapgap@dhs.gov

Non-premium cases: CSC.nonppcapgap@dhs.gov

The second supplemental Q&A is available at

http://www.uscis.gov/files/article/supplemental_opt_052308.pdf. The first supplemental Q&A is available at

http://www.uscis.gov/files/article/OPT_4Apr08.pdf. The interim rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-7427.pdf>.

2. E-Verify Update: Naturalization, Arrival Data Incorporated

Any participating company in the U.S. can access E-Verify through a government Web site that compares employee information taken from the employment authorization verification form (I-9) with more than 444 million records in the Social Security Administration (SSA) database, and more than 60 million records in Department of Homeland Security immigration databases.

U.S. Citizenship and Immigration Services (USCIS) claims that 99.5 percent of all work-authorized employees queried through E-Verify were verified without receiving a mismatch notice (Tentative Non-Confirmation (TNC)) or having to take any type of corrective action. This statistic is at odds with the view of many immigration advocates. Angela Kelley, director of the Immigration Policy Center, has noted that "[a]lmost 10 percent of naturalized citizens have received notifications about some error in their data since many of them, after their naturalization, don't notify the Social Security [Administration] of their new citizenship status." The *New York Times* said in an editorial on May 12 that "the Social Security database is rotten with errors" and the system "could force millions of Americans to battle a computerized bureaucracy that tells them, unjustly, that they cannot work." The editorial also cites "evidence of employers abusing E-Verify" by "forcing workers who are tentatively flagged as unauthorized to take pay cuts or work longer hours until they can clear their names."

USCIS says that employees whose work authorization cannot be instantly verified may work with SSA or USCIS, as appropriate, to confirm their work authorization. USCIS estimates that one percent of all queried employees

chose to contest an initial, tentative result from E-Verify, and only half of those who contest that result are ultimately found to be authorized.

A series of enhancements, intended to improve the accuracy of the system's automatic confirmation processes, was recently announced. USCIS said the E-Verify system will begin to include naturalization data, noting that naturalized citizens who have not yet updated their records with the SSA are the largest category of work-authorized persons who initially face an SSA mismatch in E-Verify. A naturalized citizen who receives a citizenship mismatch with SSA may call USCIS to resolve the issue, in addition to the option of resolving the mismatch in person at any SSA field office.

E-Verify also will now include real-time arrival data from the Integrated Border Inspection System. This additional data source is expected to reduce the number of immigration status-related mismatches for newly arriving workers.

USCIS also plans to initiate citizenship status records information-sharing with SSA to further prevent mismatches from occurring. E-Verify also plans to use checks against Department of State passport records in the near future.

More than 64,000 employers nationally participate in E-Verify, with approximately 1,000 new enrollments weekly. E-Verify evolved from the Basic Pilot/Employment Eligibility Verification Program originally developed in 1997 and made available to employers as a Web-based system in 2004. USCIS operates the program in partnership with SSA.

Related notices are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f55d1443719b9110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD> and

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=bca6fa693660a110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

Information on E-Verify and work authorization is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=1914c9676d006110VgnVCM1000004718190aRCRD&vgnnextchannel=1847c9ee2f82b010VgnVCM10000045f3d6a1RCRD>.

3. USCIS Plans to Propose Halting Concurrent I-140, I-485 Filings

U.S. Citizenship and Immigration Services (USCIS) plans to propose disallowing concurrent filings of the I-485 (Application to Register Permanent Residence or Adjust Status) with the I-140 (Immigrant Petition for Alien

Worker), and instead mandate that a worker applying for adjustment of status be the beneficiary of an approved immigrant petition before filing the adjustment application.

The Department of Homeland Security made this and other regulatory announcements in its semiannual regulatory agenda published May 5, 2008 (<http://edocket.access.gpo.gov/ua080505/pdf/ua080506.pdf>), which listed a targeted publication date of June 2008 for this proposed rule. Significant delays in publication dates listed in the semiannual regulatory agenda are common.

4. USCIS Announces Proposed Rule To Increase Periods of Stay for TN Professionals From Canada, Mexico

U.S. Citizenship and Immigration Services (USCIS) published a Notice of Proposed Rulemaking (NPRM) on May 9, 2008, to increase the maximum amount of time a Trade NAFTA (TN) professional worker from Canada or Mexico can remain in the U.S. before seeking readmission or obtaining an extension of stay. The proposal would extend the maximum period of admission for TN workers from one year to three years, the same term that USCIS currently may grant to H-1B specialty occupation workers.

The proposed rule would further allow eligible TN non-immigrants to be granted an extension of stay in increments of up to three years, as opposed to the current maximum of one year. TN non-immigrants are not subject to a maximum period of stay and thus may seek multiple readmissions or extensions, provided their intended professional activity continues and they remain otherwise eligible. Current regulations require that TN workers seek readmission or apply for an extension of stay each year.

Canadian and Mexican citizens seeking temporary entry to the U.S. as professionals may come into the country as TN non-immigrants under the North American Free Trade Agreement (NAFTA). TN status is available to Canadian and Mexican citizens with a minimum of a bachelor's degree, or appropriate professional credentials, who work in professions listed in Appendix 1603.D.1 to Annex 1603 of the NAFTA and under DHS regulations at 8 CFR 214.6(c). Eligible TN professions include, but are not limited to, accountants, engineers, attorneys, pharmacists, scientists, and teachers.

USCIS said the rule is intended to ease administrative burdens and costs on TN non-immigrants and will benefit U.S. employers. The proposed changes also would apply to spouses and unmarried, minor children of TN non-immigrants in their corresponding nonimmigrant classifications as NAFTA dependents.

Alliance of Business Immigration Lawyers members have observed that the rule would lessen the burden on TNs who are in the permanent residence process who may fear difficulties in extending their TN status, which must be temporary, ending "at a predictable time." This was not a problem when TN employers could time the filing of the immigrant petition to coincide with the foreign worker's permanent residence application. This is no longer possible: immigrant petitions must now be filed within 180 days of approval of the labor certification under the Department of Labor's "Anti-Fraud" rule. The additional two years allowable as a TN under this proposed rule will allow more "elbow room" to file all critical phases of the process without the needing to extend the TN stay, ABIL notes. However, the benefits could be undermined by the proposed halt of concurrent I-140 and I-485 filing because this will add to the time required for permanent residence processing.

The NPRM is available at <http://edocket.access.gpo.gov/2008/pdf/E8-10343.pdf>. Persons wishing to comment may access the Federal e-Rulemaking Portal and follow the instructions for submitting comments. USCIS will accept public comments until June 9, 2008.

5. Arizona Governor Signs Bill Amending Arizona Workers Act, Vetoes Bill Requiring Local Immigration Enforcement

On May 1, 2008, Governor Janet Napolitano of Arizona signed into law amendments to the Legal Arizona Workers Act (LAWA). The amendments (H.B. 2745) specify that an Arizona employer's business license may not be suspended or revoked if an employee hired before January 1, 2008, is an undocumented worker. In other ways, the amendments expand LAWA; for example, by including undocumented independent contractors among those an employer must not knowingly hire.

In other news, Governor Napolitano vetoed a bill (H.B. 2807) that would have required local law enforcement to work with federal authorities to address immigration violations. "House Bill 2807 is simply an unnecessary, unfunded mandate to law enforcement," she wrote.

A lawsuit challenging LAWA is on appeal to the U.S. Court of Appeals for the Ninth Circuit in San Francisco. For more information on the lawsuit, see http://www.nilc.org/immsemplymnt/state_local/essl002.htm.

6. Largest-Ever Immigration Raid Results in Nearly 400 Arrests, Lawsuit

Almost 400 people were arrested on May 12, 2008, by U.S. Immigration and Customs Enforcement (ICE) at Agriprocessors Inc. in Postville, Iowa. Of the

389 people arrested at the slaughterhouse and meatpacking plant, 297 pleaded guilty and were sentenced on federal felony charges. U.S. Attorney Matt Dummermuth said that "[b]ased on the number of criminal convictions, this is the largest criminal worksite enforcement operation ever in the United States."

Among others, 230 defendants were sentenced to five months in prison and three years of supervision for using false identification to obtain employment after admitting to using an actual person's identity; and 30 defendants were sentenced to five months in prison and three years of supervision for falsely using a social security number or card after admitting to using an actual person's social security.

A lawsuit was filed on behalf of almost 150 of the workers, reportedly accusing the government of arbitrary and indefinite detention and seeking to prevent the government from moving them out of state while their cases are being processed.

The ICE-led, multi-agency investigation is ongoing. A press release announcing the raid and convictions is available at <http://www.ice.gov/pi/news/newsreleases/articles/080515waterloo.htm>. Additional information about the lawsuit is available at http://www.nydailynews.com/latino/2008/05/16/2008-05-16_federal_classaction_lawsuit_filed_in_iow.html and <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20080517/NEWS/805170337>.

7. Laptops, Storage Devices May Undergo Scrutiny At Border

The Ninth Circuit Court of Appeals held on April 21, 2008 (*U.S. v. Arnold*) that the federal government has discretion to search a laptop or other personal electronic storage device at the border. The court concluded that "reasonable suspicion is not needed for customs officials to search a laptop or other personal electronic storage devices at the border," noting that "Arnold has failed to distinguish how the search of his laptop and its electronic contents is logically any different from the suspicionless border searches of travelers' luggage that the Supreme Court and we have allowed."

In the brief for amici curiae, the Association of Corporate Travel Executives (ACTE) and the Electronic Frontier Foundation (EFF) noted that although laptop searches by border agents have raised increasing concerns during the last year, they still come as a surprise to most travelers. The brief notes that in an October 2006 survey of business travel managers, ACTE found that only six percent of the managers knew that border agents randomly search,

seize, and copy the contents of travelers' computers, and only one percent had received reports from travelers that their laptops had been seized by U.S. border officials. The survey results showed that "even very experienced business travelers are completely surprised to learn that the U.S. government conducts these searches and seizures randomly," the brief noted.

ACTE and EFF noted the "wide ranging implications of the government's arguments." Indeed, they said, under the government's reasoning, border authorities could systematically collect all of the information contained on every laptop computer, BlackBerry, and other electronic device carried across our national borders by every traveler, American or foreign. "The government could then store and search all of this information without justification and without oversight from the courts." The Fourth Amendment simply does not apply. "If accepted, the government's argument will establish an end run around the Constitution's prohibition against unreasonable searches and seizures."

While this issue remains unresolved, travelers handling sensitive information for corporations or clients may wish to work remotely online using a leased computer, or e-mail information, rather than storing it on a laptop and carrying it across the border. Even a BlackBerry could pose a serious breach of privacy if carried during international travel.

The opinion is available at

[http://www.ca9.uscourts.gov/coa/newopinions.nsf/6D5D931898D8168188257432005AC9B8/\\$file/0650581.pdf?openelement](http://www.ca9.uscourts.gov/coa/newopinions.nsf/6D5D931898D8168188257432005AC9B8/$file/0650581.pdf?openelement). The brief for amici curiae is available at http://w2.eff.org/legal/cases/US_v_arnold/arnold_amicus.pdf.

New Publications and Items of Interest

USCIS genealogy program. U.S. Citizenship and Immigration Services published a final rule on May 15, 2008, effective August 13, 2008, that establishes a fee-for-service Genealogy Program "to streamline and improve the process for acquiring historical records of deceased individuals." The rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-10651.pdf>.

Immigration enforcement actions in 2006. The Department of Homeland Security's Office of Immigration Statistics recently released 2006 statistics on immigration enforcement actions. The agency noted that in 2006, it apprehended more than 1.2 million foreign nationals, of whom 88 percent were natives of Mexico. In that year, there were 8,778 Immigration and Customs Enforcement Office of Investigations criminal arrests and 6,872 convictions for immigration-related crimes. Also in 2006, ICE detained approximately 257,000 foreign nationals and removed 272,389. The leading

countries of origin of those removed were Mexico (67 percent), Honduras (10 percent), and Guatemala (7 percent). Over 1 million other foreign nationals accepted an offer to return to their home countries without a removal order. Expedited removals accounted for 110,147, or 40 percent, of all removals in 2006, and DHS removed 95,752 known criminals.

The report is available at

http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_06.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