

LitwinLaw Update

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Headlines:

- **1. File H-1B Petitions Now, ABIL Advises; USCIS Plans Proposed Rule to Establish Electronic H-1B Pre-Registration** - 53,900 cap-eligible petitions have been approved or are pending.
- **2. USCIS Delays Deemed Export Attestation on New I-129** - The new edition of Form I-129, Petition for a Nonimmigrant Worker, went into effect on December 23, 2010, but petitioners may leave Part 6 blank until February 20, 2011.
- **3. CBP Expands Global Entry 'Trusted Traveler' Program to Mexicans, SENTRI, NEXUS Members** - CBP reports that the program "reduces average wait times by 70 percent while maintaining and enhancing security."
- **4. DREAM Act Fails in Senate** - Prospects are dim for further developments in the near future, although Democrats vowed to push for the legislation and to include it in any comprehensive immigration reform bill.
- **5. Chipotle's Fires Scores of Latino Workers in Minnesota** - Chipotle's confirmed that it is fully cooperating with Immigration and Customs Enforcement officials in Minnesota.
- **6. WHD Orders Companies To Pay Back Wages, Penalties for H-1B Violations** - Common violations include the employer's failure to post notice of the filing of labor condition applications at every worksite where an H-1B worker may be employed, and failure to pay nonimmigrant workers the required wage rate for all nonproductive time caused by conditions related to employment.
- **7. California Filipino Workers Sue Hospital Over English Requirement** - The group alleges that their Filipino languages, including Tagalog, were banned even on breaks, but other workers were allowed to speak languages such as Spanish and Hindi.
- **8. USCIS Seeks OMB Approval for New E-Verify Employer Survey** - The University of Arizona will conduct the survey of 900 employers, and final summary results will be publicly released.
- **9. USCIS Issues Final Rule for CNMI-Only Investor Program** - The "E-2 CNMI Investor Visa" allows foreign long-term investors to reside in the CNMI through December 2014; petitions will be accepted beginning January 18, 2011.
- **10. USCIS Introduces First-Ever Fee Waiver Form** - The new form states requirements for documenting a fee waiver request and gives information on the methodology USCIS uses to evaluate the requests.

- **11. USCIS Seeks Comments on Petition by Entrepreneur to Remove Conditions** - The form is used by conditional resident entrepreneurs who obtained such status through a qualifying investment to apply to remove conditions on their conditional residence and on that of their spouses and children.

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Details...

1. File H-1B Petitions Now, ABIL Advises; USCIS Plans Proposed Rule to Establish Electronic H-1B Pre-Registration

H-1B filings may increase as the 65,000 numerical limit (cap) approaches. The Alliance of Business Immigration Lawyers (ABIL) recommends filing petitions now. U.S. Citizenship and Immigration Services (USCIS) reports that as of December 17, 2010, 53,900 cap-eligible petitions have been approved or were pending. USCIS has also received 19,700 H-1B petitions for individuals with advanced degrees, near that separate cap of 20,000. Once the caps are reached, no new H-1B cap-subject petitions will be accepted until April 1, 2011.

In related news, USCIS plans to propose a rule to establish electronic pre-registration for H-1B petitions. Reportedly, this would mean that an employer would first register online and wait for an H-1B number before filing the full petition with documentation. The idea is to reduce the burden on both employers and the agency in preparing and submitting petitions, entering data, and returning non-selected petitions. Details of the proposed rule and a date of publication have not yet been released.

For more on H-1B statistics and filing requirements, see

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=4b7cdd1d5fd37210VgnVCM100000082ca60aRCRD&vgnnextchannel=73566811264a3210VgnVCM100000b92ca60aRCRD>.

2. USCIS Delays Deemed Export Certification on New I-129

The new edition of Form I-129, Petition for a Nonimmigrant Worker, took effect on December 23, 2010, as previously announced by U.S. Citizenship and Immigration Services. The form is used to file nonimmigrant petitions for employees in categories such as H-1B, L-1 and O-1. The new edition has a revision date of November 23, 2010.

Part 6 of the new I-129 contains a new "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States." The employer must certify, with respect to any technology to which the employee

will have access on the job, that a license from the Departments of Commerce or State is not required to release the technology to the foreign national (or, in the rare case that a license is required, the employer will restrict the beneficiary's access to the technology until a license is obtained). Until February 20, 2011, petitioners may leave Part 6 blank.

As background, U.S. law prohibits the export of controlled technology and technical data to certain foreign nationals located within the United States without a license to do so. U.S. law treats as an export the release of controlled technology or technical data to a foreign national working in the United States, even if the company does not export anything overseas. Technology or source code is considered released for export when it is made available to foreign nationals for visual inspection (such as reading technical specifications, plans, or blueprints), when technology is exchanged orally, or when technology is made available by practice or application under the guidance of persons with knowledge of the technology. Such exports of controlled technology or technical data must be authorized through an export license issued by the Commerce or State Department before release to the nonimmigrant foreign national. To properly complete the new I-129 form, an employer must first classify the technology or technical data that will be released to, or be accessed by, a prospective foreign national employee to determine whether an export license may be required.

The Commerce Department lists items subject to export licenses at http://www.access.gpo.gov/bis/ear/ear_data.html#ccl. The State Department's export regulations are at http://www.pmdotc.state.gov/regulations_laws/itar.html. The Commerce Department has a series of six training modules, "Essentials of Export Controls," at http://www.bis.doc.gov/seminarsandtraining/essentials_of_export_ctrls.htm. The training modules may also be downloaded in PDF format at http://www.bis.doc.gov/seminarsandtraining/training-modules/essentials_of_export_controls_modules_1_6.pdf.

A two-page fact sheet focusing on universities, which includes suggested questionnaire content for the new export controls certification, is available at <http://xa.yimg.com/kq/groups/15854395/2106905181/name/I-129%20AUECO%20Practice%20Tips.pdf>.

A related USCIS announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ef1ee46afc5fc210VgnVCM100000082ca60aRCRD&vgnnextchannel=e7801c2c9be44210VgnVCM100000082ca60aRCRD>.

For additional advice on the new I-129 and deemed export attestations, contact your local Alliance of Business Immigration Lawyers (ABIL) attorney. To locate an ABIL attorney, go to <http://www.abil.com/> and click on "ABIL Attorneys" or "Global Attorneys."

3. CBP Expands Global Entry 'Trusted Traveler' Program to Mexicans, SENTRI, NEXUS Members

U.S. Customs and Border Protection (CBP) published two Federal Register notices on December 29, 2010, announcing the expansion of Global Entry benefits. One notice extends Global Entry enrollment to eligible Mexican nationals; the other notice extends Global Entry benefits to SENTRI and NEXUS members.

Global Entry is a CBP trusted traveler program that allows pre-approved members an alternative to regular passport processing lines. CBP reports that the program "reduces average wait times by 70 percent while maintaining and enhancing security."

To become a member of Global Entry, eligible Mexican nationals must complete an online application available at the Global Online Enrollment System (GOES, available at <https://goes-app.cbp.dhs.gov/>), pay a non-refundable \$100 application fee, pass a background investigation conducted by both CBP and the Mexican government, and undergo an in-person interview with a CBP officer at an enrollment center. Mexican nationals must satisfy all requirements of the Global Entry pilot program to become members. CBP began accepting applications from eligible Mexican nationals on December 29.

Also as of that date, SENTRI members may now apply for Global Entry benefits for no additional fee. CBP advises SENTRI members to check their status on the GOES Web site and indicate their wish to use Global Entry. SENTRI members who are Mexican nationals must pass a risk assessment conducted by the Mexican government before receiving full Global Entry benefits.

All NEXUS members will also be able to receive the benefits of Global Entry at no additional cost via automated kiosks at participating airports. CBP advises NEXUS members to check their status in their GOES accounts to confirm whether they need to submit 10 fingerprints or any other necessary documentation to receive Global Entry benefits.

The Global Entry pilot program was launched in 2008 and is available at 20 major airports in the U.S for approved U.S. citizens, lawful permanent residents, and citizens of the Netherlands over 14 years of age who have a valid machine-readable passport and who consent to background screening. To date, Global Entry members have used the kiosks more than 600,000 times, and there are more than 100,000 members in the program.

Global Entry applicants may complete their interview and biometric data collection at enrollment centers at any of the 20 sites. Approved members may use kiosks at any of the sites to complete their CBP processing upon arrival from international travel. At the kiosk, Global Entry members insert their passport or lawful permanent resident card into a document reader, provide digital fingerprints for comparison with fingerprints on file, answer customs declaration questions on the kiosk's touch screen, and then present a transaction receipt to CBP officers before leaving the inspection area.

CBP has signed arrangements with the governments of the United Kingdom and Germany to reciprocate Global Entry benefits with citizens from their countries.

CBP's announcement is available at

http://www.cbp.gov/xp/cgov/travel/travel_news/global_published.xml. The Federal Register notices are available at <http://edocket.access.gpo.gov/2010/pdf/2010-32832.pdf> (Mexicans) and <http://edocket.access.gpo.gov/2010/pdf/2010-32829.pdf> (NEXUS and SENTRI participants).

4. DREAM Act Fails in Senate

The House of Representatives passed the DREAM (Development, Relief and Education for Alien Minors) Act on December 8, 2010, but the Senate failed to pass the bill on December 18. The outcome was 55-41, which was five votes short of the 60 needed to bypass a filibuster by Republicans and move the bill forward.

Prospects are dim for enactment in the near future, although Democrats vowed to push for the legislation and to include it in any comprehensive immigration reform bill. President Barack Obama said he found the results "incredibly disappointing" but that his administration "will not give up on the DREAM Act, or on the important business of fixing our broken immigration system." House Speaker Nancy Pelosi said, "Though disappointed by the result of today's DREAM Act vote in the Senate, we are not deterred in our determination to continue advocating for this critical legislation." Sen. Lindsey Graham (R-S.C.) countered, "We're not going to pass the DREAM Act or any other legalization until we secure our borders. It will never be done stand-alone. It has to be part of comprehensive immigration reform." (The Senate passed a \$600 million border security bill in August.)

The DREAM Act, which has a long history, would allow qualified undocumented children to apply for conditional legal immigration status and eventually to obtain permanent residence if they meet certain requirements.

5. Chipotle's Fires Scores of Latino Workers in Minnesota

Chipotle Mexican Grill reportedly fired an estimated 50 Latino employees recently as a result of an I-9 (work authorization verification) audit. Brad Sigal of the Minnesota Immigration Rights Action Committee said, "An action like this on a mass scale before the holidays is not consistent with the image [Chipotle's has] cultivated." In a statement, Chipotle's confirmed that the company is "fully cooperating with Immigration and Customs Enforcement officials in Minnesota in connection with a document request they have made."

6. WHD Orders Companies To Pay Back Wages, Penalties for H-1B Violations

The Department of Labor's Wage and Hour Division (WHD) announced on December 7, 2010, that it had obtained a consent order to recover \$638,449 in back wages and interest from Peri Software Solutions, based in Newark, New Jersey, and its owner, Saravanan Periasamy, for H-1B violations. The company sponsored H-1B nonimmigrant programmer analysts to work in various locations in the U.S. The company and its owner also were fined \$126,778 in civil money penalties and interest for failing to provide notice of the labor condition applications at each job site and for filing lawsuits against H-1B workers for early cessation of employment. The company and Mr. Periasamy also were debarred from participation in the H-1B program for one year.

WHD said common violations include the employer's failure to post notice of the filing of labor condition applications at every worksite where an H-1B worker may be employed, and failure to pay nonimmigrant workers the required wage rate for all nonproductive time caused by conditions related to employment, such as lack of assigned work, lack of a permit, or studying for a licensing exam.

In another recent case, the Law Offices of Sergio Villaverde PLLC, a New York City law firm, was disqualified from the H-1B program for a period of two years for willfully violating prevailing wage requirements. The firm also has been ordered to pay a penalty of \$2,250 and to pay one employee back wages totaling \$31,954.

In 2003, the firm hired a nonimmigrant attorney from India as a full-time legal assistant and filed an H-1B labor condition application to allow the attorney to work legally in the U.S. An investigation by the WHD's New York District Office determined that the firm paid the legal assistant less than the required prevailing wage from January 1, 2004, to June 30, 2006. In a recent decision and order, Labor Department Administrative Law Judge Jonathan Calianos ruled that the firm, having advertised its expertise in immigration law, willfully violated the H-1B prevailing wage requirements.

The WHD press release on the Peri Software case is available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Northeast/20101207.xml>. The press release on the Villaverde case is available at <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Northeast/20101209.xml>.

7. California Filipino Workers Sue Hospital Over English Requirement

Fifty-two medical workers have accused Delano Regional Medical Center in California of discriminating against them because, they allege, they were the only group singled out under a requirement that they speak only English, even on breaks. The group alleges that their Filipino languages, including Tagalog, were banned but other workers were allowed to speak languages such as Spanish and

Hindi. The group seeks to join a Kern County federal court complaint filed in August by the Equal Employment Opportunity Commission (EEOC) concerning enforcement of a rule at the hospital requiring workers to speak English. The EEOC has accused the hospital of creating a hostile working environment for Filipinos.

A news report about the suit is available at

http://news.yahoo.com/s/ap/20101207/ap_on_bi_ge/ca_filipino_nurses_discrimination.

8. USCIS Seeks OMB Approval for New E-Verify Employer Survey

U.S. Citizenship and Immigration Services is seeking Office of Management and Budget (OMB) approval for a new information collection to survey 900 employers about the E-Verify program. The University of Arizona will conduct the survey, and final summary results will be publicly released.

According to a USCIS letter to be sent to potential participating employers, "[t]he goals of the evaluation are to understand the knowledge and perception of the E-Verify program and its utility and barriers to utilization of E-Verify. Congress is interested in this information to help it determine whether E-Verify should be made mandatory for a larger group of employers and, if so, what modifications to the current Program need to be made."

USCIS' OMB notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-32546.pdf>. The employer letter is available at

<http://www.regulations.gov/#!documentDetail;D=USCIS-2010-0018-0004>. The proposed survey is available at

<http://www.regulations.gov/#!documentDetail;D=USCIS-2010-0018-0007>.

9. USCIS Issues Final Rule for CNMI-Only Investor Program

U.S. Citizenship and Immigration Services (USCIS) issued a final rule on December 20, 2010, that creates a nonimmigrant investor visa classification in the Commonwealth of the Northern Mariana Islands (CNMI). The "E-2 CNMI Investor Visa" allows foreign long-term investors to reside in the CNMI through December 2014. Petitions for the E-2 CNMI Investor classification will be accepted beginning January 18, 2011. Petitions received before that date will be rejected.

Authorized by the Consolidated Natural Resources Act (CNRA) of 2008, the E-2 CNMI Investor Visa will be issued for two years, is renewable, and is valid only in the CNMI. The investor's spouse and children may also apply for status as dependents of the investor.

Long-term investors are individuals with certain CNMI-issued investor permits that required a fixed minimum investment amount and whose permits can be renewed over a period of multiple years.

Those eligible for E-2 CNMI Investor status include long-term business, foreign, and retiree foreign investors. To qualify, the investor must:

- have been admitted to the CNMI with a long-term investor visa under CNMI immigration law before November 28, 2009;
- have continuously maintained residence in the CNMI with long-term investor status;
- currently maintain the investment(s) that formed the basis for the CNMI long-term investor status; and
- otherwise be admissible to the U.S. under the Immigration and Nationality Act.

Investors must file an initial petition before January 18, 2013, and must use the existing Petitioner for a Nonimmigrant Worker, Form I-129, with Supplement E. After the initial petition is granted, extensions are available until December 31, 2014. The processing fee is \$325, plus an \$85 biometrics fee for certain beneficiaries who require an initial grant of status in the CNMI. Fee waivers for inability to pay are available.

The final rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-31652.pdf>. The announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543fd1a/?vgnextoid=5fb279cebb4fc210VgnVCM100000082ca60aRCRD&vgnnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD>. A related Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543fd1a/?vgnextoid=ab3379cebb4fc210VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>. For more information, see the CNMI Web page at <http://www.uscis.gov/cnmi>.

10. USCIS Introduces First-Ever Fee Waiver Form

For the first time, U.S. Citizenship and Immigration Services (USCIS) has introduced a standardized form for requesting waivers of the fees charged for immigration benefit processing. Form I-912, Request for Fee Waiver, became available for use on November 23, 2010, the same day USCIS' latest fee schedule took effect.

USCIS said it heard concerns expressed in stakeholder meetings that the absence of a standardized form led to confusion about the criteria and standards used to approve waivers. The new form states requirements for documenting a fee waiver request and gives information on the methodology USCIS uses to evaluate the

requests. For example, if an applicant can show that he or she is receiving a means-tested benefit and presents evidence to document that claim, the applicant is not required to submit further evidence. USCIS said it will use the same methodology in reviewing all fee waiver requests, whether submitted on the new I-912 or in a written statement generated by the applicant.

The announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=2a1c003cf147c210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

11. USCIS Seeks Comments on Petition by Entrepreneur to Remove Conditions

During a 60-day period that ends on January 31, 2011, U.S. Citizenship and Immigration Services is seeking comments on whether to revise the Petition by Entrepreneur to Remove Conditions (Form I-829). The form is used by conditional resident entrepreneurs who obtained such status through a qualifying investment to apply to remove conditions on their conditional residence and on that of their spouses and children.

Written comments may be submitted via one of the methods outlined in the notice, which is available at <http://edocket.access.gpo.gov/2010/pdf/2010-30143.pdf>.

New Publications and Items of Interest

New E-Verify newsletter. U.S. Citizenship and Immigration Services has published the first issue of *E-Verify Connection*, available at <http://www.uscis.gov/USCIS/Verification/E-Verify/Publications/E-Verify-Connection.pdf>.

ICE seeks to remove the wrong people. TRACImmigration reports that immigration courts are rejecting a significant and increasing number of cases in which Immigration and Customs Enforcement (ICE) has sought to remove individuals from the U.S., according to an analysis of recent case-by-case government data. Key findings include:

- During the last three months of fiscal year (FY) 2010, the rejection rate of ICE requests for removal was nearly one out of three, or 31 percent. This turndown rate is up from one out of every four 12 months earlier.
- For all of FY 2010, some courts turned down ICE removal requests more than half of the time. Among them were the immigration courts in New York City

(70% turned down), Oregon (63% turned down), Los Angeles (63% turned down), Miami (59% turned down) and Philadelphia (55% turned down).

- Considering the records for the last five years, immigration courts determined that more than a quarter of a million individuals for whom ICE sought removal were entitled to remain in the U.S.

The report is available at <http://trac.syr.edu/immigration/reports/243/>.

Delays in immigration court decisions. The Transactional Records Access Clearinghouse (TRAC) has released a new report showing that during fiscal year 2010, immigration courts took 20 percent longer to act on cases than they did the previous fiscal year. The average number of days it took to dispose of cases decided during FY 2010 was 280 days, which was 47 days longer on average than completion times for FY 2009. It took the longest time to complete those cases in which the court granted some form of relief. Completion times for relief cases took an average of 696 days, or roughly 23 months in FY 2010, which was 39 days longer than the average time spent in FY 2009. Cases in which the presiding judge issued a removal order took the shortest amount of time, an average of 140 days. This was still 17 percent longer than the time similar cases took in 2009. Voluntary departures orders took an average of 323 days, an increase of only 3 days over times during FY 2009.

The report, which analyzes TRAC's analysis of case-by-case data it obtained under the Freedom of Information Act from the Executive Office for Immigration Review covering the period through September 27, 2010, is available at <http://trac.syr.edu/immigration/reports/244/>.

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
