

LitwinLaw Update

October 1, 2008

Headlines:

- **1. Employment Visa Categories Backlogged** - Many employment category cut-off dates have been established for October.
- **2. DV-2010 Visa Lottery Entry Period Begins** - The DV-2010 Lottery online entry period runs from noon EDT on October 2, 2008, to noon EST on December 1, 2008.
- **3. EAD Delays: What To Do?** - The USCIS ombudsman recommended several steps if an EAD is delayed beyond 90 days.
- **4. Congress Extends Four Immigration Programs until March 2009** - Congress has extended four immigration programs that were due to expire this fall: (a) Immigrant Investors; (b) E-verify; (c) Religious Workers; (d) Medical Doctors in medically underserved areas.
- **5. Travel May Be Risky While Adjustment Application Is Pending, recent Case Shows** - Traveling outside the U.S. while an adjustment of status application is pending can be risky, even with advance parole. Here is an example of when advance parole did not work.
- **6. Naturalization Form Added To Direct Mail Program** - The Direct Mail program now includes Form N-400, Application for Naturalization; non-military N-400 applications should be filed with the appropriate Lockbox.
- **7. Ninth Circuit Upholds Arizona Law Targeting Employers Hiring Undocumented Workers** - The law's principal sanction is the revocation of state licenses to do business in Arizona for employers who hire undocumented workers.
- **8. New Naturalization Test Implemented; USCIS Updates Processing Times** - USCIS began administering the redesigned naturalization test on October 1, 2008.

Also in this issue:

[New Publications and Items of Interest](#)

[Government Agency Links](#)

Details...

1. Employment Visa Categories Backlogged

The October 2008 Visa Bulletin disseminated by the Department of State's Visa Office notes that the May 2008 Visa Bulletin had stated that many employment cut-off dates had been advancing very rapidly, based on indications that U.S. Citizenship and Immigration Services (USCIS) would need to review a significantly larger pool of applicants than there were numbers available to maximize number use under the fiscal year (FY) 2008 annual limits. The May Bulletin also stated that if the USCIS projections proved to be incorrect, it would be necessary to adjust the cut-off dates during the final quarter of FY 2008. USCIS estimates have proven to be very high, the October Bulletin notes, resulting in (1) the unavailability of all employment third preference categories beginning in July, (2) the unavailability of visa numbers for China and India employment second preference adjustment of status cases during September, and (3) the establishment of many October employment category cut-off dates that are earlier than those that applied during FY 2008.

Little if any forward movement of the cut-off dates in most employment categories is likely until the extent of the USCIS backlog of old priority dates can be determined, the State Department noted, estimating that the FY 2009 employment-based annual limit will be very close to the 140,000 minimum.

The EB-3 cutoff of January 1, 2005, is disappointing given the fact that it regressed 17 months from March 1, 2006, in June when the Visa Office opined that it would fully recover by October. The specter of little forward motion, and the fact that priority dates were in the 2002 range through much of the last fiscal year, gives little cause for comfort. Such employees may wish to consider filing for the DV-2010 lottery (see next story).

The October 2008 Visa Bulletin is available at http://travel.state.gov/visa/frvi/bulletin/bulletin_4357.html.

2. DV-2010 Visa Lottery Entry Period Begins

The DV-2010 Lottery online entry period runs from noon EDT on October 2, 2008, to noon EST on December 1, 2008. For DV-2010, Russia has been added back to the list of eligible countries. Kosovo was also added. No countries have been removed from the list of eligible countries.

Information and instructions for the DV-2010 lottery are available at http://travel.state.gov/visa/immigrants/types/types_1318.html.

Employers concerned about delays for workers caught in the EB-3 backlog (see prior story) may wish to encourage such employees to file for the DV lottery.

3. EAD Delays: What To Do?

U.S. Citizenship and Immigration Services' ombudsman has been receiving numerous inquiries about employment authorization document (EAD) applications pending more than 90 days. USCIS regulations require the agency to approve EAD applications within 90 days, but that is not happening in some cases. The USCIS ombudsman recommends the following steps:

Step 1: Call USCIS National Customer Service Center (NCSC) at 1-800 375-5283 and record the time and date of the call and the name and number of the representative:

- Explain to the representative that your EAD has been pending more than 90 days and ask for a "service request." You should receive a response to your service request within a week.

- or -

- Ask the representative to request an interim card for you. You should receive an EAD or response within a week.

Step 2: If you choose to visit a local USCIS office, schedule an INFOPASS appointment to visit that office at <http://www.infopass.uscis.gov>. During the appointment, ask to apply for an interim EAD. The ombudsman notes that USCIS local offices no longer issue interim EADs, but the local office can review your case and determine eligibility. The local office will then forward your request to the appropriate USCIS Service Centers. You should receive an EAD or response within a week, the ombudsman states.

Step 3: If you have tried both Step 1 and Step 2 and have still not received your EAD or an interim card, the ombudsman asks that you e-mail cisombudsman.publicaffairs@dhs.gov the details of your efforts. Include the date and time of your call to the NCSC and the name of the representative. If you visited a USCIS office, provide that information. The ombudsman promises to "look into your case and review how we may be of assistance."

For all other case inquiries, the ombudsman says you should submit DHS Form 7001 to the ombudsman's office. For more on this issue, see http://www.dhs.gov/xabout/structure/gc_1221837986181.shtm.

4. Congress Extends Four Immigration Programs until March 2009

Congress has extended four immigration programs that were due to expire this fall: the EB-5 immigrant investor regional center program; the E-Verify program, which allows employers to electronically verify an employee's work eligibility; the religious worker visa program; and the Conrad State 30 program for certain foreign doctors who work in medically underserved areas. The EB-5 regional center and E-Verify programs were included in H.R. 2638, a bill that funds the federal government for the next several months. The religious worker and Conrad State 30 programs were passed in separate bills (S. 3606 and H.R. 5571, respectively). All four extensions last until March 6, 2009.

5. Travel May Be Risky While Adjustment Application Is Pending, Recent Case Shows

The Alliance of Business Immigration Lawyers warns that traveling outside the U.S. while an adjustment of status application is pending can be risky, even with advance parole. A recent case illustrates this point. While his adjustment application was pending, Nadeem Hassan, a citizen of Pakistan, traveled outside the U.S. to Saudi Arabia. He received an I-512 advance parole travel document, which granted him permission to return to the U.S. so long as his application for adjustment remained pending. While Hassan was abroad, the government denied his adjustment application and revoked the advance parole. When he attempted to return to the U.S., he was denied admission, placed in expedited removal proceedings, and removed. He challenged the denial of status adjustment and revocation of advance parole.

A federal district court held that under the REAL ID Act of 2005, both the denial of the adjustment of status and the revocation of the advance parole were discretionary decisions that the court lacked jurisdiction to review, and the U.S. Court of Appeals for the Ninth Circuit recently agreed, affirming the district court's dismissal of the case. The Ninth Circuit noted that Hassan was granted advance parole solely to allow him to return to the U.S. while his application for status adjustment was pending. Thus, the court reasoned, once Hassan's application for adjustment of status was denied, he was no longer eligible for advance parole.

The full text of the decision is available at
<http://www.metnews.com/sos.cgi?0908%2F0617252>.

6. Naturalization Form Added To Direct Mail Program

U.S. Citizenship and Immigration Services (USCIS) announced that the Direct Mail program now includes Form N-400, Application for Naturalization. Non-military N-400 applications should be filed with the appropriate Lockbox. The notice also provides a 30-day transition period whereby the Service Centers will forward any N-400 applications received at their facilities to the appropriate Lockbox. Military applicants should continue to file Military N-400 cases at the Nebraska Service Center (NSC), USCIS said. In addition, NSC will also accept and process N-400s filed by spouses of active members of the military.

Beginning on October 14, 2008, applicants must submit the N-400 and related supplements to one of two new USCIS Lockbox facilities for initial processing, using the addresses provided in the notice at <http://edocket.access.gpo.gov/2008/pdf/E8-21083.pdf>. A related Federal Register notice is available at <http://edocket.access.gpo.gov/2008/E8-21083.htm>.

7. Ninth Circuit Upholds Arizona Law Targeting Employers Hiring Undocumented Workers

The U.S. Court of Appeals for the Ninth Circuit recently upheld the district court in *CPLC v. Napolitano*, a facial challenge to a 2007 Arizona state law, the Legal Arizona Workers Act (LAWA), that targets employers who hire undocumented workers. The law's principal sanction is the revocation of state licenses to do business in Arizona. The Ninth Circuit noted that the law has yet to be enforced against any employer. The plaintiffs, various business and civil rights organizations, alleged that the LAWA violates employers' rights to due process by denying them an opportunity to challenge the federal determination of the work authorization status of their employees before sanctions are imposed.

The district court had held that the law was not preempted. The main argument on appeal was that the law is expressly preempted by federal immigration law preempting state regulation other than through licensing and similar laws. The Ninth Circuit found that the district court correctly determined that the LAWA was a "licensing" law within the meaning of the federal provision and therefore was not expressly preempted.

The court also noted a secondary, implied preemption issue that principally relates to the provision requiring employers to use the electronic verification system, E-Verify, to check the work authorization status of employees

through federal records. Under current federal immigration law, use of the system is voluntary; the court noted that the Arizona law makes it mandatory. The court held that such a requirement to use the federal verification tool, for which there is no substitute under development in either the state, federal, or private sectors, is not expressly or impliedly preempted by federal policy.

The plaintiffs also contended that the Arizona statute does not guarantee employers an opportunity to be heard before their business licenses may be revoked. The statute, the court said, "can and should be reasonably interpreted to allow employers, before any license can be adversely affected, to present evidence to rebut the presumption that an employee is unauthorized." The Ninth Circuit upheld the statute in all respects against the facial challenge, but observed that it was brought against "a blank factual background of enforcement and outside the context of any particular case. If and when the statute is enforced, and the factual background is developed, other challenges to the [LAWA] as applied in any particular instance or manner will not be controlled by our decision," the court stated.

The Ninth Circuit's opinion is available at

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F05A5F67FDA9AEE6882574C7005021AB/\\$file/0717272.pdf](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/F05A5F67FDA9AEE6882574C7005021AB/$file/0717272.pdf).

8. New Naturalization Test Implemented; USCIS Updates Processing Times

U.S. Citizenship and Immigration Services (USCIS) began administering the redesigned (new) naturalization test on October 1, 2008. The revised test emphasizes the fundamental concepts of American democracy and the rights and responsibilities of citizenship.

USCIS has released a chart showing who may take the current or the new test. For the chart and additional details, including links to the test and the naturalization application, see

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2de5bece24e7b110VgnVCM1000004718190aRCRD&vgnnextchannel=2de5bece24e7b110VgnVCM1000004718190aRCRD>.

New Publications and Items of Interest

[Immigration debate tracker](#). The German Marshall Fund of the United States presents the U.S. presidential candidates' views on immigration. Also included are links to articles about the candidates' views. The tracker is available at http://www.gmfus.org/election2008/debate_immigration.html.

Immigration prosecutions increase. A new report, *Prosecutions for 2008*, shows that federal prosecutions are up an estimated 26.8 percent over last year, and that the single largest jump in prosecutions was for immigration cases, which accounted for 49.2 percent of prosecutions through June 2008. The lead investigative agency was U.S. Customs and Border Protection, followed by U.S. Immigration and Customs Enforcement. During the first nine months of 2008, the most frequently recorded charge was "entry of alien at improper time or place, with 33,792 charges recorded, followed by "reentry of deported alien," with 15,432 charges recorded. The report, by *TRAC Reports*, is available at <http://trac.syr.edu/tracreports/crim/198/>.

Nonimmigrant admissions. The Department of Homeland Security's newly released *Nonimmigrant Admissions to the United States: 2007*, notes that 171 million nonimmigrants were admitted to the U.S. in 2007. These included tourists and business travelers from Canada, Mexican nationals with Border Crossing Cards, and all admissions requiring the submission of an I-94 form. I-94 admissions accounted for 22 percent (37 million) of the total admissions, the report notes. The majority (90 percent) of I-94 admissions were short-term visitors such as tourists and business travelers, while the remaining 10 percent (3.6 million) were temporary residents characterized by a longer duration of stay, such as specialty workers, students, and nurses. The leading countries of citizenship for I-94 admissions were Mexico, the United Kingdom, and Japan.

Admissions of temporary workers and trainees increased 13 percent from 2006 to 2007. The report attributes this increase primarily to the following classes: H-2A (31 percent), H-1B (23 percent), and H-2B/H-2R (16 percent). Although seasonal agricultural workers (H-2A) comprised only 7.8 percent of temporary worker admissions in 2007, the report states, the number of entries under this class increased 88 percent from 2006 to 2007. Student admissions rose 14 percent from 2006 to 2007, and 93 percent of that increase reflected academic student entries (F-1). Entries of intracompany transferees (L-1) grew 13 percent from 2006 to 2007, and exchange visitor admissions (J-1) increased 15 percent during the same period.

The report notes that the leading countries of citizenship for H-1 admissions in 2007 were India (34 percent), Canada (5.7 percent), and the United Kingdom (5.5 percent). From 2006 to 2007, H-1B admissions from India increased 25 percent (32,000 admissions).

Nearly half of academic student admissions (F-1) were nationals of five countries: South Korea (15 percent), India (9.4 percent), China (8.5 percent), Japan (8.2 percent), and Mexico (7 percent), the report notes. Since 2005, Mexico, China, and India have shown consistent increases in F-1 admissions, while admissions from Japan have declined.

The report is available at

http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ni_fr_2007.pdf. The DHS also has released *Data on Nonimmigrant Admissions*, available at <http://www.dhs.gov/ximgtn/statistics/publications/YrBk07NI.shtm>, and *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2007*, available at <http://www.dhs.gov/xlibr>.

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