

# LitwinLaw Update

March 1, 2011

## Headlines:

- **1. Export Controls Attestation Requirement Started February 20** - As of February 20, 2011, employers must fill out the export controls attestation in Part 6 of the new edition of the Petition for a Nonimmigrant Worker (Form I-129).
- **2. USCIS Issues Work Authorization and Advance Parole on Single Card for Adjustment Applicants** - The card will serve as both an employment authorization and advance parole document.
- **3. Mayorkas Discusses USCIS Goals for 2011; VIBE System Introduced** - It is recommended that companies should check their profile and make sure that the major areas are correct to avoid requests for evidence in the future.
- **4. DOS Releases New Guidance on L Visas, Specialized Knowledge** - DOS noted "concern about the potential for inconsistent adjudicatory standards at different constituent posts," and said that "clear standards would allow for more consistent adjudication."
- **5. DOL Posts New FAQ for H-1B, H-1B1, E-3 Programs; Releases New Data** - The Office of Foreign Labor Certification has posted a new FAQ for the H-1B, H-1B1, and E-3 programs.
- **6. E-Verify Self-Check Going Live in March** - The self-check process is voluntary and available to any individual who wants to check his or her own work authorization status before employment and facilitate correction of errors in federal databases.
- **7. Labor Dept. Board Rules Against Company for Failing to Pay H-1B Worker for Travel Time** - A company policy against paying for travel is not among the exceptions to an H-1B employer's obligation to pay H-1B nonimmigrant workers their wages, the ARB said.
- **8. DHS, DOS Establish Annotated B-1 Visa for Foreign Maritime Workers Applying for ID Program** - The new process will apply to the approximately 4,000 to 6,000 foreign workers in U.S. ports who must have a "TWIC" ID for the performance of their official duties.

## Also in this issue:

[New Publications and Items of Interest](#)

[Government Agency Links](#)

## Details...

### 1. Export Controls Attestation Requirement Started February 20

As of February 20, 2011, employers must fill out the export controls attestation in Part 6 of the new edition of the Petition for a Nonimmigrant

Worker (Form I-129). 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.

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). 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.

For 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."

---

## **2. USCIS Issues Work Authorization and Advance Parole on Single Card for Adjustment Applicants**

U.S. Citizenship and Immigration Services (USCIS) announced that it is now issuing employment and travel authorization on a single card for certain applicants filing an Application to Register Permanent Residence or Adjust Status (Form I-485). USCIS said the new card "represents a significant improvement from the current practice of issuing paper Advance Parole documents."

The card appears similar to the current Employment Authorization Document (EAD) but includes text that reads, "Serves as I-512 Advance Parole." A card with this text serves as both an employment authorization and advance parole document.

An applicant may receive this card when he or she files an Application for Employment Authorization (Form I-765) and an Application for Travel Document (Form I-131) concurrently with or after filing the I-485. USCIS said it will continue to issue separate EAD and advance parole documents when warranted. Employers may accept the new card as a List A document when completing the Employment Eligibility Verification (Form I-9).

USCIS noted that as with the current advance parole document, obtaining the combined card allows an adjustment applicant to travel abroad and

return to the U.S. without abandoning the pending adjustment application. Upon returning to the U.S., the applicant must present the card to request parole through the port-of-entry, and the decision to parole the individual is made at the port-of-entry. Those who have been unlawfully present in the U.S. and subsequently depart and seek re-entry through a grant of parole may be inadmissible and ineligible to adjust their status, USCIS warned.

The USCIS notice, released on February 11, 2011, is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=44028bcbf851e210VgnVCM100000082ca60aRCRD&vgnnextchannel=c94e6d26d17df110VgnVCM1000004718190aRCRD>.

---

### **3. Mayorkas Discusses USCIS Goals for 2011; VIBE System Introduced**

On February 17, 2011, Alejandro Mayorkas, Director of U.S. Citizenship and Immigration Services (USCIS), held a press conference at which he discussed the agency's goals for 2011 and a policy review already underway. The agency's goals and planned activities for 2011 include, among others:

- Piloting the Validation Instrument for Business Enterprises (VIBE) tool, which uses commercially available information from Dun & Bradstreet to validate evidence submitted by companies petitioning to employ a foreign worker in the U.S.
- Promoting consistency in the administration of immigration laws and adjudication policies as part of a comprehensive policy review, and updating policies where necessary
- Issuing precedent decisions from the Administrative Appeals Office on a regular basis
- Combating fraud, including the unauthorized practice of law
- Expanding outreach efforts for E-Verify, which is currently expanding at a rate of approximately 1,300 new employers per week

USCIS has begun beta-testing the VIBE system. USCIS promised that it will give employers an opportunity to respond when the VIBE system leads to agency concerns regarding the business. It is recommended that companies

check their profile and make sure that the major areas (company address for example) are correct to avoid requests for evidence in the future.

The transcript of the press conference is available at [http://www.uscis.gov/USCIS/News/2011%20New%20Items/February%202011/transcript\\_StrategicGoalsInit\\_2011.pdf](http://www.uscis.gov/USCIS/News/2011%20New%20Items/February%202011/transcript_StrategicGoalsInit_2011.pdf).

---

#### **4. DOS Releases New Guidance on L Visas, Specialized Knowledge**

The Department of State (DOS) released a new cable in January to all diplomatic and consular posts on guidelines for L visa adjudications, particularly in regard to evaluating claims of "specialized knowledge." DOS noted "concern about the potential for inconsistent adjudicatory standards at different constituent posts," and said that "clear standards would allow for more consistent adjudication." The cable adds, however, that "[u]nfortunately, the statutory language defining 'specialized knowledge' is not simple or clear."

The cable notes that a worker is considered to be serving in a capacity involving specialized knowledge with respect to a company if he or she "has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company." The cable acknowledges that the definition contains undefined terms and elements of circular reasoning.

Given the lack of statutory clarity, the cable notes that determinations of specialized knowledge often depend on the consular officer's expertise on a case-by-case basis. The cable, which outlines criteria that posts may use in making such adjudications, is available at [http://travel.state.gov/pdf/Guidance\\_on\\_L\\_Visas\\_and\\_Specialized\\_Knowledge-Jan2011.pdf](http://travel.state.gov/pdf/Guidance_on_L_Visas_and_Specialized_Knowledge-Jan2011.pdf).

---

#### **5. DOL Posts New FAQ for H-1B, H-1B1, E-3 Programs; Releases New Data**

The Department of Labor's Office of Foreign Labor Certification (OFLC) has posted a new frequently asked questions (FAQ) document for the H-1B, H-1B1, and E-3 programs. The FAQ discusses, among other things, which visa classifications require the filing of a labor condition application (LCA); the definition of a "specialty occupation"; how to obtain H-1B disclosure

information or file an H-1B complaint; details on initiating the hiring and application processes; LCA requirements; prevailing wage issues; notice requirements; working conditions; post-LCA-approval changes; termination of employment; and other issues.

Among other things, the FAQ notes that H-1B complaints should be filed with the local Wage and Hour Division office that has jurisdiction over the physical location of the employer. The OFLC suggests checking the "blue pages" in the telephone book or <http://www.dol.gov/whd/america2.htm#Map>. The form for filing a complaint (Form WH-4) may be downloaded at [http://www.dol.gov/whd/forms/fts\\_wh4.htm](http://www.dol.gov/whd/forms/fts_wh4.htm).

The FAQ is available at <http://www.foreignlaborcert.doleta.gov/pdf/H1BFAQ021711.pdf>.

The OFLC also is now making available quarterly disclosure files covering employer applications processed under the PERM, H-1B, H-2A, and H-2B visa programs. Additionally, the OFLC is publishing a new set of case level data covering employer requests for prevailing wage determinations processed by the OFLC National Prevailing Wage Center, which opened in January 2010 in Washington, DC.

The new data are available at <http://www.foreignlaborcert.doleta.gov/quarterlydata.cfm>.

---

## **6. E-Verify Self-Check Going Live in March**

The Department of Homeland Security (DHS) is establishing a new self-check process for E-Verify, effective March 18, 2011. The self-check process is voluntary and available to any individual who wants to check his or her own work authorization status before employment and facilitate correction of errors in federal databases (such as those of the Social Security Administration, DHS, and the Department of State) that feed information into the E-Verify process. DHS said E-Verify Self-Check "provides a vehicle for an individual to proactively check work authorization status prior to the employer conducting the E-Verify inquiry."

DHS noted that when an individual uses E-Verify Self-Check, he or she will be notified either that (1) the information matched the federal databases and the individual would be deemed work-authorized, or (2) there was a

"mismatch," in which case he or she will be given instructions on how to correct the record(s).

The notice announcing the new system and inviting comments, which must be submitted by March 18, 2011, is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-02-16/pdf/2011-3490.pdf>.

---

## **7. Labor Dept. Board Rules Against Company for Failing to Pay H-1B Worker for Travel Time**

The Department of Labor's Administrative Review Board (ARB) ruled on January 31, 2011, against a medical software company, Integrated Informatics, Inc., for failing to pay an H-1B nonimmigrant computer programmer for two days of traveling for a work project. The ARB rejected the company's argument that it had a policy of withholding payment for travel. "Even accepting as true that Integrated's policy is not to compensate its employees for travel time, a company policy is not among the exceptions to an H-1B employer's obligation to pay H-1B nonimmigrant workers their wages," the ARB said.

The decision is available at [http://op.bna.com/dlrcases.nsf/id/jaca-8dupbr/\\$File/Integrated.pdf](http://op.bna.com/dlrcases.nsf/id/jaca-8dupbr/$File/Integrated.pdf).

---

## **8. DHS, DOS Establish Annotated B-1 Visa for Foreign Maritime Workers Applying for ID Program**

The Departments of Homeland Security (DHS) and State (DOS) have announced the creation of an annotated version of the B-1 visa that will make foreign maritime workers eligible to apply for a Transportation Worker Identification Credential (TWIC). The TWIC is a tamper-resistant biometric identification card that maritime workers must obtain to gain unrestricted access to secure areas of maritime facilities.

Under this process, foreign maritime workers who need to acquire a TWIC for the performance of their official duties must provide notice of their need for the TWIC to DOS upon applying for a B-1 visa, and a letter from their employer stating that the worker must perform service in secure port areas. Upon receipt of the new TWIC-annotated B-1 visa, each individual will apply separately for a TWIC. The new process will apply to the approximately 4,000 to 6,000 foreign workers in U.S. ports who must have a TWIC for the performance of their official duties.

The Transportation Security Administration (TSA) published a TWIC final rule in January 2007 allowing noncitizens to apply for a TWIC provided that they meet one of TSA's eligible categories. Following input from maritime industry stakeholders, DHS and DOS collaborated to create the new process.

The DHS announcement is available at  
[http://www.dhs.gov/ynews/releases/pr\\_1297280840745.shtm](http://www.dhs.gov/ynews/releases/pr_1297280840745.shtm).

---

## **New Publications and Items of Interest**

AAO on precedent decisions. The Administrative Appeals Office (AAO) of U.S. Citizenship and Immigration Services recently released a presentation, "Administrative Appeals Office: Precedent Decisions." The presentation discusses the nuts-and-bolts of what a precedent decision is and is not, and how precedent decisions are published. The presentation also briefly discusses the history of the publication of immigration-related precedent decisions. As noted above in the first article, the AAO plans to publish more precedent decisions in the future.

The presentation is available at  
<http://www.uscis.gov/USCIS/Laws/AAO/AAO%20DHS%20Precedent%20Decision%20Process%20Print%20Version.pdf>.

U.S. citizenship test - wrong answers? An article in the February 23, 2011, issue of *Slate* magazine online discusses incorrect answers on the U.S. citizenship test. For example, the article notes that question 36 asks the applicant to name two members of the President's Cabinet. One of the possible answers listed is "Vice President"; although the vice president is a Cabinet-level officer, he is not a member of the President's Cabinet because only unelected heads of executive departments are considered as such, and the Vice President is elected. The article is available at  
<http://www.slate.com/id/2286258/pagenum/all/#add-comment>.

USCIS survey on E-Verify. U.S. Citizenship and Immigration Services (USCIS) reported that a customer satisfaction survey found that E-Verify received an overall score of 82 out of 100. CFI Group, a consulting firm specializing in customer satisfaction measurements, developed the survey last July and questioned more than 4,500 random employers using E-Verify. Respondents included new and current users and federal contractors required to use the system.

USCIS also reported on a recent U.S. Government Accountability Office (GAO) report, stating that the GAO "cites improvements in the reduction of

mismatch rates, ensuring employer compliance, and establishing better safeguards for employees' personal information." The GAO report also noted, however, that E-Verify errors persist and are difficult to correct.

The customer satisfaction survey results report is available at <http://www.uscis.gov/USCIS/Resources/Reports/E-Verify/e-verify-satisfaction-report-10-15-10.pdf>. USCIS' announcement is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a6adb46adba9d210VgnVCM100000082ca60aRCRD&vgnnextchannel=a2dd6d26d17df110VgnVCM1000004718190aRCRD>. The GAO report is available at <http://www.gao.gov/new.items/d11146.pdf>.

Migration Policy Institute on E-Verify. The Migration Policy Institute has released a new report, "E-Verify: Strengths, Weaknesses, and Proposals for Reform," which examines E-Verify's implementation, improvements over time, and continuing challenges, and sketches a way forward for effective employment verification. Because any new E-Verify mandate runs a risk of adverse unintended consequences, the report recommends that changes be phased in gradually and evaluated against performance benchmarks. In the longer term, the report suggests, the most promising strategy for successful expansion of E-Verify will be to link new employment verification mandates to a targeted or comprehensive immigration reform effort. Only then would both employers and current undocumented workers have positive incentives to use the program and comply with its requirements. The report is available at <http://www.migrationpolicy.org/pubs/E-Verify-Insight.pdf>.

Immigration and High-Tech Entrepreneurship. The Center for Technology Innovation at Brookings has released a study showing that the founding teams of about 16 percent of a nationally representative sample of high-impact, high-technology companies include at least one immigrant. About 77 percent of those are U.S. citizens. Most are well-educated and have substantial professional experience. The study outlines three policy options that could expand the pool of potential high-impact, high-tech immigrant entrepreneurs over the long term: clearing the green card (permanent residence) backlog, easing the pathway from student visa to work visa to green card, and creating a "point system" for a limited number of unsponsored green card applicants. The study is available at [http://www.brookings.edu/papers/2011/02\\_immigration\\_hart\\_acs.aspx](http://www.brookings.edu/papers/2011/02_immigration_hart_acs.aspx).

---

## 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](http://travel.state.gov/visa/bulletin/bulletin_1360.html)

