

LitwinLaw Update

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ICE To Audit 1,000 Employers Nationwide for I-9 Violations – The new actions bring the FY 2011 I-9 audit total to 2,338, surpassing the FY 2010 record.

USCIS Summarizes Stakeholder Engagement on L-1B Interpretation of 'Specialized Knowledge' – USCIS released an executive summary on the L-1B nonimmigrant classification with respect to interpretation of the term "specialized knowledge."

NLRB Updates Immigration Status Procedures During NLRB Proceedings – A new memorandum from the National Labor Relations Board (NLRB) provides a brief introduction to immigration status issues and an update on how such issues should be addressed during NLRB investigations and proceedings.

B-1 in Lieu of H-1B Option Under Threat – The Department of State is discussing with the Department of Homeland Security removing or substantially modifying the B-1 in lieu of H-1B option.

Democrats Reintroduce Comprehensive Immigration Reform Bill – Among other things, the bill would mandate the use of an employment verification system, establish a federal commission on immigration, and offer an earned path to citizenship for undocumented people already in the United States.

Sen. Lamar Smith Introduces Mandatory E-Verify Bill – The bill seems likely to pass the House and has already been endorsed by key business associations.

Senate Holds Hearing on DREAM Act of 2011 – The Senate Subcommittee on Immigration, Refugees and Border Security held a hearing on the Development, Relief, and Education for Alien Minors (DREAM) Act of 2011 on June 28, 2011.

USCIS, Mississippi Implement New E-Verify Tool – USCIS launched a new feature that allows its E-Verify program to validate the authenticity of Mississippi driver's licenses used by employees as I-9 identity documents.

How to Protect Personal Data in Redesigned Green Card – USCIS provides a foil envelope encasing the new card, and advises permanent residents to keep the card in the envelope at all times to prevent unwanted wireless communication with the RFID chip.

DOS Speaks on J-1 Summer Work Travel Interim Final Rule – The Department spoke about the new regulatory amendments that take effect July 15, 2011.

USCIS Ombudsman Issues Advice to Employers on Documenting the 'Temporary' Nature of H-2B Work – The Ombudsman has provided information in response to reports that USCIS is issuing RFEs in H-2B nonagricultural worker cases that question the claimed "temporary" nature of an employer's business need for foreign labor.

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ICE To Audit 1,000 Employers Nationwide for I-9 Violations

U.S. Immigration and Customs Enforcement (ICE) reported that it is auditing approximately 1,000 U.S. employers, of a range of sizes and in every state, to ensure compliance with I-9 employment authorization verification procedures. ICE has not specified which companies are affected, but it is expected to be focusing on critical sectors, to include agriculture and food; banking and finance; chemical; commercial facilities; commercial nuclear reactors, materials and waste; dams; defense industrial base; drinking water and water treatment systems; emergency service; energy; government facilities; information technology; national monuments and icons; postal and shipping; public health and health care; telecommunications; and transportation systems.

It was reported that the new actions bring the fiscal year 2011 I-9 audit total to 2,338, surpassing the fiscal year 2010 record of 2,196.

USCIS Summarizes Stakeholder Engagement on L-1B Interpretation of 'Specialized Knowledge'

On June 14, 2011, U.S. Citizenship and Immigration Services (USCIS) released an executive summary of its stakeholder engagement session held in May to discuss issues related to the L-1B nonimmigrant classification, specifically with respect to interpretation of the term "specialized knowledge" and what standards and evidentiary requirements should be followed in determining eligibility for this classification.

USCIS reported, among other things, that an overwhelming majority of stakeholders asserted that the existing regulatory definition of "specialized knowledge" and USCIS policy memoranda relating to this issue are "fine as written, and there is no need to issue any new policy memorandum." Some stakeholders reportedly said that the definition of "specialized knowledge" should be interpreted more broadly than is currently being practiced at the service centers. Stakeholders noted that USCIS is interpreting the definition too narrowly, as evidenced by Requests for Evidence (RFE) and denials that many petitioners are receiving for this category. One stakeholder stated that it appears that USCIS has made a change in its interpretation in recent years without any change in the law. Some stakeholders said that the current interpretation did not meet the needs of employers because it was being too strictly and narrowly interpreted. They suggested that it would better serve employers if there were more flexibility and a broader interpretation of the term. USCIS said it "will provide additional guidance and training to USCIS officers adjudicating L-1B petitions."

The summary is available at

http://www.uscis.gov/USCIS/Outreach/Upcoming%20National%20Engagements/National%20Engagement%20Pages/2011%20Events/May%202011/L-1B%20SK%20stakeholder%20teleconf%20Executive%20Summary%20-%20SCOPSOPSOCC%20_6-14-11_.pdf. Additional Department of State guidance on L visas and specialized knowledge, released in January, is available at http://travel.state.gov/pdf/Guidance_on_L_Visas_and_Specialized_Knowledge-Jan2011.pdf.

NLRB Updates Immigration Status Procedures During NLRB Proceedings

A new memorandum from the National Labor Relations Board (NLRB) provides a brief introduction to immigration status issues and an update on how such issues should be addressed during NLRB investigations and proceedings. The memo notes that the National Labor Relations Act (NLRA) protects all employees covered by the NLRA regardless of immigration status, but that immigration status issues may affect remedies and occasionally present other practical difficulties with respect to enforcement of the NLRA.

Supplementing earlier guidance (GC 02-06, available at <http://www.lawmemo.com/nlrb/gc02-06.htm>), the new memo provides further guidance for proceeding when immigration status issues arise during NLRB case handling. It also identifies immigration agencies that have discretion to provide immigration remedies and other assistance to discrimination victims or witnesses in NLRB proceedings. Among other things, the memo notes:

- NLRB officials generally should presume that employees are lawfully authorized to work. They should refrain from conducting a *sua sponte* immigration investigation and should object to questions concerning the discriminatee's immigration status at the merits stage.
- NLRB officials should investigate the discriminatee's immigration status only after a respondent establishes the existence of a genuine issue (during the remedial stage).
- NLRB officials should conduct an investigation by asking the union, the charging party, and/or the discriminatee to respond to the employer's evidence.
- NLRB officials should consult GC 02-06 for additional direction.

The memo notes that NLRB discriminatees, witnesses, or voting-eligible employees may be taken into custody by immigration officials. In addition, immigration status may be inextricably intertwined with an unfair labor practice, such as where immigration threats or related conduct are the basis of the unfair labor practice allegation. Or the issue may be as simple as an employee volunteering information about immigration status or asking NLRB officials for immigration advice or assistance.

NLRB officials "should not provide immigration advice," the memo notes. "Resolution of these issues is best addressed when employees can obtain immigration advice through their union or from an independent immigration attorney." NLRB officials may refer interested persons to the list of accredited immigration services providers maintained by the Department of Justice and found at <http://www.justice.gov/eoir/statspub/raroster.htm>. The memo notes that individuals sometimes are mistaken about their immigration status and NLRB officials should not assume that immigration status information volunteered by an unrepresented person is correct.

The memo also notes that in certain cases where immigration status is of particular significance, the agency may decide to seek the assistance of one of the three immigration agencies (U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Patrol) to advance the effective enforcement of the NLRA. Such agencies may assist in providing visa remedies, deferring immigration actions during the pendency of the NLRB proceeding, and/or releasing individuals from custody or providing access to witnesses in custody.

The June 7, 2011, memo is available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458049525b>.

B-1 in Lieu of H-1B Option Under Threat

Amid reports that U.S. consulates (particularly in India) are cracking down on B-1 visa applications when they suspect the person may be "working" in the U.S., the Department of State and U.S. Immigration and Customs Enforcement are reportedly investigating Infosys Technologies Ltd. with respect to allegations that it may be using short-term B-1 visas for employees who should be subjected to the more difficult H-1B visa process. Infosys said it "received a subpoena from a grand jury in the United States District Court for the Eastern District of Texas. The subpoena requires us to provide information to the grand jury regarding our sponsorships for, and uses of, B-1 business visas."

The probe comes on the heels of a lawsuit filed by an Infosys employee alleging that Infosys has been misusing the B-1 visa program. After the lawsuit was filed, Sen. Chuck Grassley (R-Iowa) sent a letter on April 14, 2011, to Secretary of State Hillary Clinton and Secretary of Homeland Security Janet Napolitano demanding an investigation. The Department of State responded on May 13, and Sen. Grassley issued a comment on May 25. The Department of State said, "We are in the process of discussing with [the Department of Homeland Security] removing or substantially modifying the B-1 in lieu of H guidelines, which State first proposed eliminating in a 1993 Federal Register notice." The letter says such a change "requires DHS coordination and may require Federal Register notice, thus it may take some time before...any change is implemented."

Sen. Grassley's April 14 letter and May 25 comment are available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=34705. The Department of State's response is available at <http://grassley.senate.gov/judiciary/upload/Immigration-05-24-11-response-from-State-using-B-1-to-circumvent-H-1B-doc.pdf>.

Democrats Reintroduce Comprehensive Immigration Reform Bill

Sen. Robert Menendez (D-N.J.) and six other Democrats reintroduced the Comprehensive Immigration Reform Act of 2011 (S. 1258) on June 22, 2011, a bill that would mandate the use of an employment verification system, establish a federal commission on immigration, and offer an earned path to citizenship for undocumented people already in the United States.

The 679-page bill is similar to legislation introduced by Sen. Menendez and other Democrats in September 2010. Senate Majority Leader Harry Reid (D-Nev.), along with Sens. Patrick Leahy (D-Vt.), Dick Durbin (D-Ill.), Charles Schumer (D-N.Y.), and Kirsten Gillibrand (D-N.Y.), co-sponsored the legislation. The bill includes measures to strengthen border security, enhance worksite enforcement of immigration laws, and requirements that the estimated 11 million undocumented people in the U.S. register with the government, pay taxes, learn English, pay a fine, pass a background check, and wait in line for permanent residence.

The bill also includes a mandatory employment verification system, and enforcement measures such as additional resources for the Border Patrol; expanded penalties for passport and document fraud; new requirements for the Department of Homeland Security to track entries and exits at the border; rules governing detention to ensure that U.S. citizens are not unlawfully detained; and new criminal penalties for fraud and misuse of Social Security numbers.

A "Standing Commission on Immigration, Labor Markets, and the National Interest" would be created as part of the bill to evaluate labor market and economic conditions and recommend numerical limits for employment-based visa programs to Congress.

The bill received broad praise from immigrants' rights groups, who stressed the importance of addressing all aspects of the nation's broken immigration system instead of focusing on standalone measures such as an E-Verify mandate.

The bill would also alter several visa programs, including the H-2A agricultural guestworker program and the EB-5 investor visa program.

The text of the bill was not yet available online as of press time.

Sen. Lamar Smith Introduces Mandatory E-Verify Bill

House Judiciary Committee Chairman Lamar Smith (R-Tex.) recently introduced the "Legal Workforce Act" (H.R. 2164), a bill that would require all businesses to verify the legal status of workers using the online E-Verify system. The bill seems likely to pass the House and has already been endorsed by key business associations, including the U.S. Chamber of Commerce, the National Restaurant Association, the National Association of Home Builders, and the National Federation of Independent Business.

Opponents of the bill argue that there are not enough U.S. workers available to fill the estimated 8 million jobs held by undocumented workers, 90 percent of which are non-agricultural. Statements from SEIU, the National Immigration Law Center, and others echoed the idea that an E-Verify mandate without a path to legalization for undocumented workers already in the United States would undermine the U.S. economy.

The text of the bill is available at <http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2164>.

Senate Holds Hearing on DREAM Act of 2011

The Senate Subcommittee on Immigration, Refugees and Border Security held a hearing on the Development, Relief, and Education for Alien Minors (DREAM) Act of 2011 on June 28, 2011. Sen. Dick Durbin (R-Ill.) opened the hearing. Witnesses included Janet Napolitano, Secretary of the Department of Homeland Security; Arne Duncan, Secretary of the Department of Education; Dr. Clifford Stanley, Under Secretary of Defense for Personnel and Readiness; Ola Kaso, a DREAM Act student; Lt. Col. Margaret Stock, and Steven Camarota, Director of Research for the Center for Immigration Studies.

Secretary Napolitano said the Obama administration "strongly supports the DREAM Act." She noted that in the closing days of the 111th Congress, the DREAM Act passed the House of Representatives with bipartisan support and fell a few votes short in the Senate. She commended Sen. Durbin and the 34 co-sponsors who have signed onto the bill thus far. She said the DREAM Act would "allow the Department to devote a greater portion of limited DHS resources to removing individuals who actually pose a risk to public safety or security." She said the DREAM Act would do this "by providing a firm but fair way for individuals brought into our country as children – through no fault of their own – to obtain legal status by pursuing higher education, or by serving in the U.S. Armed Forces for the country where they have grown up and which they consider their home."

She noted that, as introduced in the Senate, the DREAM Act "establishes a rigorous process for those who entered the United States illegally as children to obtain conditional permanent resident status by proving that they meet several strict requirements." Those applying for conditional permanent resident status, she said, would also need to submit biometric and biographic data and undergo security and law enforcement background checks and a medical examination. Without the DREAM Act, Secretary Napolitano said, "young people will continue to be caught up in the immigration removal system, siphoning resources away from other, more pressing needs." She said that it does not make sense from a law enforcement or public safety perspective "to devote limited enforcement resources on young people who pose no threat to public safety, who were brought to this country illegally by no fault of their own and have grown up here, and who want to contribute to our country by serving in the military or going to college."

The hearing testimony and a webcast of the hearing are available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba604d881>.

USCIS, Mississippi Implement New E-Verify Tool

On June 13, 2011, U.S. Citizenship and Immigration Services (USCIS) launched "Records and Information from DMVs for E-Verify (RIDE)," a new feature that allows the agency's E-Verify program to validate the authenticity of Mississippi driver's licenses used by employees as Form I-9 identity documents.

More than 80 percent of employees present driver's licenses to establish their identities when undergoing the I-9 employment authorization verification process. By enabling E-Verify to compare driver's license data against state records, USCIS said, RIDE will improve E-Verify's accuracy and help combat document fraud while observing safeguards to protect employees' personal data. "RIDE helps combat document fraud by enabling E-Verify to confirm the authenticity of an additional identity document," USCIS said. For example, previously, if an employee presented a driver's license to establish his or her identity and a Social Security card to establish his or her authorization to work, E-Verify would only have been able to confirm the validity of the Social Security card. RIDE enables E-Verify employers in Mississippi to confirm the validity of both documents.

The new E-Verify RIDE feature builds on existing technology and infrastructure that the Mississippi Department of Public Safety (MDPS) and other state public safety departments use

in conjunction with the American Association of Motor Vehicle Administrators. Mississippi is the first state to partner with USCIS to implement RIDE.

Currently, 4,336 employers representing more than 9,000 worksites in Mississippi use E-Verify. Nationwide, more than 269,000 employers at over 900,000 worksites are enrolled in the E-Verify program.

USCIS' announcement is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=304cadec01a80310VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

How to Protect Personal Data in Redesigned Green Card

One of USCIS' recent improvements to the green card is an embedded Radio Frequency Identification (RFID) chip that allows U.S. Customs and Border Protection (CBP) officers at ports of entry to read personal data embedded in the card from a distance and compare it immediately to personal data on file. Additionally, the RFID chip adds a level of security to confirm that the card has not been tampered with, and makes it more difficult to counterfeit cards.

USCIS provides a foil envelope encasing the new card, and advises permanent residents to keep the card in the envelope at all times to prevent unwanted wireless communication with the RFID chip. Because the RFID chip can be scanned by any RFID scanner within a reasonable distance, the envelope is needed to block the effective range of the chip, reducing the possibility that personal data may be electronically "pick-pocketed."

CBP has implemented "Ready Lane" pilot programs at various ports of entry, including El Paso and Donna, Texas, and Otay Mesa, California. RFID technology expedites travel across the land border because CBP officers do not have to manually enter traveler information during the primary inspection. Thus, RFID-enabled travel documents reduce the time it takes to process travelers at the border.

To use Ready Lane, travelers should follow three simple steps as they approach a U.S. land port of entry with their RFID-enabled green card: (1) stop at the entry to the inspection lane and wait for a signal to move forward; (2) remove the green card from its protective envelope and hold it up with the flat front face of the card toward a window on the driver's side. The RFID chip will be read automatically while the vehicle proceeds to the inspection booth; and (3) stop at the inspection booth and be prepared to present documents for all travelers in the vehicle to the CBP officer.

For more information about the redesigned green card, see the USCIS fact sheet and card image at:

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=34233893c4888210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

DOS Speaks on J-1 Summer Work Travel Interim Final Rule

On June 20, 2011, a Department of State spokesperson answered a question about an interim final rule, effective July 15, 2011, that amends regulations on the J-1 Summer Work Travel (SWT) program. The spokesperson noted that given the size of the program, with approximately 120,000 college and university student participants in 2010, the Department has decided to "enhance safeguards," including:

- A pilot program for six countries (Belarus, Bulgaria, Moldova, Romania, Russia, and Ukraine) aimed at thwarting the potential for abuse of summer work travel participants who come from those countries; and new program-wide regulations designed to strengthen and clarify current program oversight and administration requirements
- A special e-mail address and a toll-free telephone number, available 24 hours per day and 7 days per week, to enable students to have ready, direct contact with the Department about program complaints or issues
- Department of State welcome letters and program brochures provided to each program participant to better inform them about what to expect in the Summer Work Travel program
- An "aggressive and proactive" system to monitor sponsors better, including ongoing data analysis, complaint tracking, and on-site visits to sponsors to fully assess their compliance with, and the effectiveness of, the new regulations
- Closer scrutiny of visa applications of potential SWT program participants from the pilot program countries. Consular officers refuse visas to those applicants who do not demonstrate that they are eligible for visas, including compliance with the pilot program's conditions

The transcript is available at <http://www.state.gov/r/pa/prs/ps/2011/06/166631.htm>. The interim final rule is available at <http://www.federalregister.gov/articles/2011/04/26/2011-10079/exchange-visitor-program-summer-work-travel>.

USCIS Ombudsman Issues Advice to Employers on Documenting the 'Temporary' Nature of H-2B Work

U.S. Citizenship and Immigration Services' (USCIS) Ombudsman has provided information in response to reports that USCIS is issuing Requests for Evidence (RFEs) in H-2B nonagricultural worker cases that question the claimed "temporary" nature of an employer's business need for foreign labor.

The Ombudsman explained that employers seeking to participate in this program must establish to USCIS' satisfaction that their need for temporary non-agricultural services or labor is either seasonal, due to a peakload need, intermittent, or a one-time occurrence. While temporary needs of a significant length may be approved as a one-time occurrence, the petitioner's business need must be temporary, such as 10 months or less, the Ombudsman said. H-2B workers are commonly employed in the landscaping, hotel, recreation, and forestry industries based upon seasonal need.

To establish seasonal need, the Ombudsman noted, petitioners must show that the service or labor is related to a season of the year by an event or pattern that recurs annually. "It is recommended that petitioners also specify the period(s) of time during each year in which they do not need the services or labor," the Ombudsman said.

H-2B petitions are by their nature time sensitive, and petitioners are on tight time schedules for filing their submissions with the Department of Labor (DOL) and USCIS. Delays in submission or processing can have serious financial consequences for employer petitioners.

To minimize the likelihood of receiving an RFE, the Ombudsman suggested that petitioners may want to support their initial submissions to USCIS with additional documentation "that clearly demonstrates that a specific work need covered by the petition is temporary, tied to a predictable peakload period or is seasonal, and will reoccur annually on the same or similar cycle."

USCIS told the Ombudsman that it also would be helpful to include with the H-2B petition:

- Signed work contracts, letters of intent from clients, and monthly invoices from previous calendar year(s) clearly depicting the type and regularity of work that was, or will be, performed during each month of the requested period of need.
- Summarized monthly payroll records/reports over the past two calendar years that clearly identify and separately distinguish the petitioner's permanent employee staff from its temporary H-2B staff in the requested occupation.
- Any other documentation (e.g., work schedules, company provided housing, transportation records) that evidences the cyclical trend of seasonal temporary hires, and that clearly reveals gap periods that fall between such seasons.

The Ombudsman's update is available at
http://www.dhs.gov/files/publications/gc_1305648318975.shtm.

New Publications and Items of Interest

Immigration enforcement actions in 2010. The Department of Homeland Security's Office of Immigration Statistics has published "Immigration Enforcement Actions: 2010." The short annual report, which presents information on the apprehension, detention, return, and removal of foreign nationals during 2010, notes, among other things, that DHS returned 476,000 foreign nationals to their countries of origin in 2010 without a removal order. Mexican nationals accounted for 83 percent of the 516,992 aliens apprehended in 2010. The next leading countries were Guatemala, El Salvador, and Honduras. Those four countries accounted for 94 percent of all apprehensions. The report is available at
<http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

Stories from Cuba. NAFSA: Association of International Educators has launched a website, "Connecting Our World," and has posted a collection of stories from Cuba pursuant to the new expansion of U.S. academic travel to Cuba. The interactive site asks readers to share stories from their travels and studies in Cuba. The stories collected so far are available at
http://www.connectingourworld.org/?page_id=2088.

Immigrant skills in U.S. metro areas. A new report by the Brookings Institution's Metro Policy Program, "The Geography of Immigrant Skills: Educational Profiles of Metro Areas," finds that immigrants in the U.S. who have a bachelor's degree now outnumber those without a high school diploma. In 1980, just 19 percent of immigrants aged 25 to 64 held a bachelor's degree, the report notes, and nearly 40 percent had not completed high school. By 2010, 30 percent of working-age immigrants had at least a college degree and 28 percent lacked a high school diploma. The report also notes that 44 of the nation's 100 largest metropolitan areas are high-skill immigrant destinations, in which college-educated immigrants outnumber immigrants without high school diplomas by at least 25 percent. These destinations include Washington, DC, and large coastal metro areas like San Francisco. The 30 low-skill destinations, in which the relative sizes of these immigrant skill groups are reversed, include many in the border states of the West and Southwest, as well as in the Great Plains.

The report argues that a pragmatic approach to immigration "should include a more flexible admissions system to respond to labor market changes." With the United States at a critical point in both immigration policy and economic trajectory, the report notes, "policymakers should carefully weigh options to provide support for immigrant workers at all skill levels to keep the United States globally competitive."

The report is available at

http://www.brookings.edu/~media/Files/rc/papers/2011/06_immigrants_singer/06_immigrants_singer.pdf.

Business representatives conference. USCIS' Texas Service Center (TSC) will host a Business Representatives Conference on Wednesday, July 13, 2011. TSC will also offer scheduled tours of the Lewisville Lockbox facility on the Tuesday afternoon before and the Thursday morning after the conference. If you plan to attend, please RSVP to tsc.university@dhs.gov.

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

Visa application wait times for any post: http://travel.state.gov/visa/temp/wait/wait_4638.html