

LitwinLaw Update

August 1, 2008

Headlines:

- **1. EB-2 Numbers for India, China Advance in August; Employment Third Preference Category Are Unavailable** - The EB-2 visa category for India and China advances in August to June 1, 2006, a jump of more than two years.
- **2. USCIS Updates Cap Info for H-1B Workers for FY 2009** - USCIS has added 5,800, the projected number of unused H-1B1 Chile/Singapore visas, to the FY 2009 H-1B cap; this does not necessarily mean that more H-1B visa cases can be filed for FY 2009, however
- **3. Bill Would Extend E-Verify for 10 Years** - With E-Verify set to expire in November, some lawmakers feel there is insufficient time to do anything other than pass a 5-year extension.
- **4. USCIS Adds Vaccines to Requirements for Permanent Residents** - USCIS revised the list of vaccines required for applicants seeking permanent resident status.
- **5. USCIS Revises Biometric Instructions for Reentry Permits and Refugee Travel Documents** - Applicants for re-entry permits and refugee travel documents must provide biometrics (e.g., fingerprints and photographs) at a USCIS Application Support Center.
- **6. Labor Dept. Proposes Modifying LCA, Seeks Comment on Labor Certs for Ag Workers** - The LCA modifications are primarily due to the conversion to the electronic submission system; the Department also seeks comment on measures to improve the labor certification program for the temporary employment of nonimmigrant agricultural workers.
- **7. State Dept. Releases Annual Student and Exchange Visitor Update** - The cable asks posts to have a clear procedure in place for expediting F, M, and J appointments.
- **8. New "Exit Tax" Imposed on U.S. Citizens and Long-Term Permanent Residents** - The new exit tax is a major deterrent for wealthy individuals who are considering applying for permanent residence.

- **9. USCIS Extends Validity of EADs for Refugees** - USCIS is extending the validity of initial work authorization documents for refugees to two years after arrival in the U.S.
- **10. USCIS Continues Suspension of Premium Processing for Religious Workers** - USCIS said it cannot reasonably ensure a level of processing service within 15 calendar days.

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Details...

1. EB-2 Numbers for India, China Advance in August; Employment Third Preference Category Are Unavailable

The Department of State's Visa Bulletin for August notes that the employment-based second preference (EB-2) visa category for India and China has advanced to June 1, 2006, a jump of more than two years. Meanwhile, demand for visa numbers has resulted in the employment third preference "Other Worker" category reaching the annual fiscal year 2008 numerical limit. As a result, this category has become unavailable beginning in August and will remain so for the remainder of FY 2008. This will be temporary, however, and the employment third preference cut-off date will return in October, the first month of the new fiscal year, to January 1, 2003. Other employment categories are not expected to move in August.

The Visa Bulletin is available at

http://travel.state.gov/visa/frvi/bulletin/bulletin_4310.html.

2. USCIS Updates Cap Info for H-1B Workers for FY 2009

U.S. Citizenship and Immigration Services (USCIS) recently noted that 6,800 visas are set aside during the fiscal year for the H-1B1 program under legislation implementing the U.S.-Chile and U.S.-Singapore Free Trade Agreements. Unused numbers in this pool can be made available for H-1B use with start dates beginning on October 1, 2008, the start of FY 2009. USCIS has added 5,800, the projected number of unused H-1B1 Chile/Singapore visas, to the FY 2009 H-1B cap. As of the update, the cap for H-1B1s for FY2009 had not been reached.

This does not necessarily mean that more H-1B visa cases can be filed for FY 2009, however. In the past, USCIS has taken unused Chile/Singapore

H-1B numbers into account in their estimates based on prior usage and not adjusted the allocation once the final count became available.

This and related updates are available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=138b6138f898d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=91919c7755cb9010VgnVCM10000045f3d6a1RCRD>.

3. Bill Would Extend E-Verify for 5 Years

With E-Verify set to expire in November, some lawmakers feel there is insufficient time to do anything other than pass a 5-year extension. "We've got six weeks left in this session, and we're just not going to get that done," said Rep. Zoe Lofgren (D-Cal.). She and Rep. John Conyers (D-Mich.) are moving a bill for a 5-year extension through the House of Representatives. It is unclear whether the Senate will agree. Any reform of the verification process will have to wait until the next administration.

4. USCIS Adds Vaccines to Requirements for Permanent Residents

U.S. Citizenship and Immigration Services (USCIS) announced on July 24, 2008, a revised list of vaccines required for applicants seeking permanent resident status. This revision follows guidance from the Centers for Disease Control and Prevention (CDC).

CDC's revised *Technical Instructions to Civil Surgeons for Vaccination Requirements* require the following age-appropriate additional vaccinations to adjust status to legal permanent resident:

- Rotavirus
- Hepatitis A
- Meningococcal
- Human papillomavirus
- Zoster

The requirements for these new vaccines went into effect on July 1, 2008; however, CDC approved a 30-day grace period for any medical exam conducted before August 1, 2008. Starting on that date, the new vaccinations, if appropriate, must be administered for USCIS to approve the applicant for adjustment of status.

USCIS has revised the Report of Medical Examination and Vaccination Record (Form I-693) to include these new vaccination requirements. The June 5, 2008, edition of the I-693 must be used for any medical examination completed on or after August 1, 2008.

USCIS's notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=902252b10f45b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. The CDC's revised *Technical Instructions to Civil Surgeons for Vaccination Requirements* are available at <http://www.cdc.gov/ncidod/dq/civil.htm>. USCIS has posted a list of frequently asked questions about the revised vaccination requirements at <http://www.uscis.gov>.

5. USCIS Revises Biometric Instructions for Reentry Permits and Refugee Travel Documents

U.S. Citizenship and Immigration Services (USCIS) has issued revised instructions for Form I-131, Application for Travel Document. The instructions include changes that require applicants for re-entry permits and refugee travel documents to provide biometrics (e.g., fingerprints and photographs) at a USCIS Application Support Center (ASC) for background and security checks and to meet requirements for secure travel and entry documents containing biometric identifiers.

The new instructions for the I-131 require that applicants for re-entry permits and refugee travel documents who are ages 14 through 79 provide biometrics before departing from the U.S. Applicants are strongly encouraged to apply, whenever possible, well in advance of their anticipated travel dates to allow time to attend their ASC appointments and to receive their travel documents. Shortly after filing an I-131 for a refugee travel document or a re-entry permit, USCIS will mail the applicant his or her receipt and an ASC scheduling notice. Certain overseas USCIS offices may, in their discretion, accept and adjudicate an I-131 filed for a refugee travel document (but not a re-entry permit), where the applicant has failed to apply while in the U.S. Applicants for refugee travel documents should not count on the overseas offices necessarily agreeing to accept and adjudicate an I-131 in all cases, however, particularly where it is evident to the agency that the individual could have applied while in the U.S. and attended his or her biometrics appointment.

If applicants require expedited processing, the instructions provide specific information for submitting pre-paid express mailers with the I-131 for USCIS to send the applicant his or her receipt and ASC appointment notice, as well as the completed re-entry permit or refugee travel

document, if approved. A request for expedited processing should contain the applicant's reasons for such processing so that USCIS may determine whether the applicant qualifies for expedited processing.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=9c1161ccdc20b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

6. Labor Dept. Proposes Modifying LCA, Seeks Comment on Labor Certs for Ag Workers

The Department of Labor seeks comment on the labor condition application (LCA) for H-1B, H-1B1, and E-3 nonimmigrants. The modifications being proposed to ETA Forms 9035, 9035CP, and 9035E are primarily due to the elimination of the "Fax Back" system and converting exclusively to the electronic submission system, except in rare cases of physical disability that prevents use of a computer. The Department noted that all three forms need to be updated to eliminate all reference to the "Fax Back" system and "provide more clarity to the user of the form, thereby obtaining more accurate information for the Department to assist in more efficient and effective adjudication of the requested benefit." The Department said the information collected remains the same. The *Federal Register* notice related to the LCA is available at <http://edocket.access.gpo.gov/2008/pdf/E8-14464.pdf>.

The Department also seeks comment on measures to improve the labor certification program for the temporary employment of H-2A nonimmigrant agricultural workers. The Department noted that employers who have received certification for temporary foreign agricultural labor must inform their local State Workforce Agency (SWA) in writing if the H-2A workers do not depart for the place of employment three days before the date of need as specified in their labor certification applications. The departure date is used to start the running of the contract period for administration of the "Fifty Percent Rule." The employer must continue to provide employment to any qualified and eligible U.S. worker who applies to the employer until 50 percent of the work contract period, under which the foreign worker is in the job, has elapsed. The employer's obligation to engage in positive recruitment ends on the date the foreign workers depart for the employer's place of business. The notification required under the regulations is written by the employer and sent to the SWA. The SWA uses the information to calculate the end of active recruitment requirements and Fifty Percent Rule referral requirements.

The Department is particularly interested in comments that: (1) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submissions of responses.

That notice is available at <http://edocket.access.gpo.gov/2008/pdf/E8-14465.pdf>.

7. State Dept. Releases Annual Student and Exchange Visitor Update

The Department of State's Bureau of Consular Affairs has released the annual update of its student and exchange visitor (F, M, and J visas) issues. The cable asks posts to have a clear procedure in place for expediting F, M, and J appointments, with first-time applicants being given the highest priority. The cable also discusses summer work and travel issues, clarifies some information on Form DS-2019, and reminds posts about required annotations and the end of requirements to put DS-2019 forms in sealed envelopes. The cable also notes the changes in J-1 sponsor sanctions procedures.

The cable is available at http://travel.state.gov/visa/laws/telegrams/telegrams_4202.html.

8. New "Exit Tax" Imposed on U.S. Citizens and Long-Term Permanent Residents

The new "exit tax," under the Heroes Earnings Assistance and Relief Tax Act of 2008, applies only to U.S. citizens who expatriate and long-term (eight years or longer) permanent residents who lose their status (voluntarily or otherwise) on or after the date of enactment, which was June 17, 2008. The prior tax law continues to apply to U.S. citizens who expatriated and long-term residents who lost their permanent resident status before June 17. The new exit tax may prove to be a major deterrent for wealthy individuals who are considering applying for permanent residence.

The Reed Amendment exclusion ground for U.S. citizens who expatriate to avoid paying U.S. taxes was not repealed or modified (as proposed in some earlier versions of the exit tax). There are no regulations to implement it, however.

The exit tax includes a capital gains tax on the unrealized gain in a covered expatriate's worldwide assets, and a transfer tax on all gifts and bequests from a covered expatriate to any U.S. person during the life or upon the death of the covered expatriate. A "covered expatriate" is a person who gives up U.S. citizenship or loses permanent resident status (having held it for at least eight of the past 15 years) and who: (1) has a net worth of more than \$2 million; or (2) had average U.S. federal income tax liability of more than \$139,000 over the past 5 years; or (3) fails to certify under penalty of perjury that he or she has complied with all federal tax obligations for the past five years. There are limited exceptions for dual citizens from birth and persons who expatriate before age 18½.

The exit tax is a major deterrent for wealthy individuals who are considering permanent resident status, and a potentially huge tax penalty for permanent residents who wish to leave the U.S. or have already done so. It is already prompting wealthy individuals who have held permanent resident status for less than eight years to surrender their green cards before they become subject to this tax. In such circumstances, several nonimmigrant visa options permit long-term residence in the U.S. without exposure to the exit tax.

The exit tax is contained in the Heroes Earnings Assistance and Relief Tax Act of 2008, which is available at <http://www.opencongress.org/bill/110-h6081/text>.

9. USCIS Extends Validity of EADs for Refugees

U.S. Citizenship and Immigration Services (USCIS) recently announced that it is extending the validity of initial Employment Authorization Documents (EADs) for refugees to two years after arrival in the United States. Previous policy required renewal of the EAD after one year, except in certain adjustment cases that were expected to remain pending for more than one year.

USCIS said the new policy will reduce the financial burden on refugees by eliminating the need for many refugees to apply for renewal of work authorization documents before they are able to adjust status to permanent residence. There is no fee for the initial application for a refugee EAD, but applicants incur a \$340 fee for renewals.

USCIS estimated that a refugee would request, at minimum, one EAD renewal before adjustment of status if the EAD validity period were not extended to two years.

The notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=f8ef93de9b21b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

10. USCIS Continues Suspension of Premium Processing for Religious Workers

U.S. Citizenship and Immigration Services (USCIS) announced that the suspension of premium processing service for religious worker (R-1) nonimmigrant visa petitions will continue at least until January 7, 2009. A previous six-month suspension was announced on January 4, 2008.

The Premium Processing Service provides faster processing of certain employment-based petitions and guarantees a 15-calendar day processing time. Because of the complexities of adjudicating R-1 nonimmigrant visa petitions, USCIS said it cannot reasonably ensure a level of processing service within 15 calendar days.

On April 25, 2007, USCIS proposed significant revisions to its regulations related to the special immigrant and nonimmigrant (R-1) religious worker visa classifications. The proposed rule suggested steps to eliminate fraud in the religious worker program and discussed potential vulnerabilities addressed in an August 2005 Benefit Fraud Assessment conducted by USCIS's Office of Fraud Detection and National Security. USCIS said it is considering comments on the proposed rule.

USCIS will continue processing R-1 nonimmigrant visa petitions, including procedures that may include inspections, evaluations, verifications, and compliance reviews for religious organizations. These procedures necessitate exceeding the 15-day guarantee for premium processing.

In the future, the agency said it may reconsider this decision if it is able to properly process these cases within 15 calendar days of receipt. USCIS may prescribe additional conditions of availability on the Premium Processing Service for religious worker petitions.

The USCIS notice is available at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=788bc1cacd70b110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>.

New Publications and Items of Interest

GAO: Improve passport operations. In 2007, following the implementation of new document requirements for travelers entering the U.S. from within the Western Hemisphere, the Department of State received a record number of passport applications. In June 2009 further document requirements are scheduled to go into effect and will likely lead to another surge in passport demand. In a report released on July 2008, the Government Accountability Office (GAO) examined (1) the extent to which the Department was prepared for the surge in passport demand and how its readiness affected passport operations, (2) the Department's actions to increase passport production capacity in response to the surge, and (3) the Department's readiness for near-term surges in demand and its strategy to improve passport operations.

The GAO noted that the Department was unprepared for the record number of passport applications it received in 2007, leading to significant delays. Reported wait times reached 10 to 12 weeks in the summer of 2007, more than double the normal wait, with hundreds of thousands of passports taking significantly longer. The Department had difficulty tracking individual applications and failed to effectively measure or communicate to applicants the total expected wait times, prompting many to re-apply and further straining processing capacity.

The Department took a number of emergency measures and accelerated other planned efforts to increase its passport production capacity in 2007. As a result of these efforts and the normal seasonal decline in passport applications, the GAO noted, wait times returned to normal by October 2007. According to Department estimates, these emergency measures cost \$42.8 million. Although the Department has taken steps to improve its ability to respond to near-term surges in passport demand, the GAO found that the Department lacks a comprehensive strategy to improve long-term passport operations. The GAO noted that the Department previously identified several deficiencies that limited the efficiency and effectiveness of passport operations, such as reliance on a paper-based work flow and ineffective communications. The Department identified a framework to guide its modernization efforts, but the GAO concluded that it does not have a comprehensive plan to prioritize and synchronize improvements to its passport operations. A comprehensive strategy for making these improvements would better equip the Department to handle a significantly higher workload in the future, the GAO said.

The report, "State Department: Comprehensive Strategy Needed to Improve Passport Operations" (GAO-08-891), is available at <http://www.gao.gov/new.items/d08891.pdf>.

USCIS ombudsman 2008 recommendations. The ombudsman for U.S. Citizenship and Immigration Services has released a chart of 2008 recommendations and activity, available at http://www.dhs.gov/xlibrary/assets/cisomb_recommendations_to_uscis_stat_us_chart.pdf.

Article: emphasis on border control ineffective. Philip Kretsedemas, co-editor of *Keeping Out the Other: A Critical Introduction to Immigration Today* and professor of sociology at the University of Massachusetts, has written "What's Different About the Immigration Problem We Face Today - And What Can Be Done About It." The article notes that the debate about undocumented migration still "seems to be lodged in a paradigm that is organized around border control. Although this emphasis is not entirely misplaced, it also tends to produce distorted explanations of undocumented migration and ineffective strategies for controlling undocumented migration." The article is available at <http://hnn.us/articles/49469.html>.

Labor certification process. The U.S. Department of Labor (DOL) is harming the competitiveness of U.S. companies and the growth of U.S. jobs and innovation by enforcing a labor certification policy not intended by Congress and divorced from economic reality, according to a new study released by the National Foundation for American Policy (NFAP). The study, "Certifiable: The Department of Labor's Approach to Labor Certification," concludes that although the law requires labor certification for most skilled immigrants seeking a green card, the DOL has "created the current system out of whole cloth." The study is available at <http://www.nfap.com/pdf/080731laborcertification.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