

# LitwinLaw Update

March 1, 2008

## Headlines:

- **1. Get Ready... Get Set... File H-1B applications!** – If you want to hire a new H-1 employee, the petition must be filed on April 1<sup>st</sup>.
- **2. Fines, Prosecutions for Hiring Undocumented Workers to Increase** - The increased fines are expected to take effect March 27, 2008, and will be assessed on a per-worker basis.
- **3. Many Employment Visa Number Cut-Off Dates Advance in March** - Visa number cut-off date movement for March in several employment categories is significant.
- **4. USCIS Issues Q&A on Delays, House Holds Hearing** - USCIS has issued questions and answers on receipting and processing delays, along with some fee issues; the House of Representatives held a hearing on naturalization delays.
- **5. DOS Testifies on Status of Visa Policy for Foreign Students, Scholars, Exchange Visitors** - Foreign students contribute over \$13 billion annually to the U.S. economy.
- **6. USCIS Revises Security, Name Check Requirements** - USCIS is revising its guidance in response to a need to align the agency's background and security check policies with those of U.S. Immigration and Customs Enforcement.
- **7. E-Verify Participants Increasing by 1,000 Per Week** - The E-Verify employment status verification program now has more than 52,000 employer participants.
- **8. A New Online Guide: Navigating the Immigration Debate** – Have a little extra time and want to learn more about the complex immigration issues, even though you may not agree with everything.

## Also in this issue:

[New Publications and Items of Interest](#)

[Government Agency Links](#)

## Details...

### 1. Get Ready... Get Set... File H-1B applications!

This year, all of the numbers for 65,000 H-1Bs will be used by the first day in April, even though they will not be effective until October 1, 2008. Due to a legal requirement, if all the numbers are completely used on April 1<sup>st</sup>, the USCIS must also accept all cases filed on April 2<sup>nd</sup>, as well. Then, a lottery will be held for all the petitions filed on those two days. There will only be no more than 65,000 winners, from an estimated 150,000-200,000 filings. What is the cause of this mess?

A few years ago, Congress set a 65,000 annual limit on new H-1Bs. Between 2001 and 2003, the annual limit was 195,000. A couple of years ago, the numbers were used fairly rapidly. For the fiscal year 2005-2006, the "cap" was reached on August 10, 2005, nearly two months before the start of the fiscal year. For the fiscal year 2006-2007, the cap was reached on May 26, 2006. This brings us to April 2007. On April 2<sup>nd</sup> (April 1<sup>st</sup> was a Sunday), the **unimaginable** happened. Due to the growing, pent up need for H-1B professionals, the total annual allocation for fiscal year 2007-2008 was used on that day. This was historic, since such a thing had never happened before. The total filings for April 1<sup>st</sup> and 2<sup>nd</sup> were approximately 122,000, with only 65,000 numbers available. This year, with an ever-increasing need looming, while it is difficult to estimate precisely, 200,000 filings is well within reason.

Employers must now make a decision: pay attorney's fees plus filing fees for a **gamble** at winning an H-1B number or not participate in the ridiculous lottery system. (By the way, the USCIS will return filing fees or petitions that are not chosen.) Many employers have little or no choice but to try. Petitions must be prepared immediately to avoid a last-minute frenzy. If you plan on filing an H-1B petition, you should contact your immigration attorney immediately to begin the paperwork.

Please note: Extensions of stay or changes of employer for persons who are already on H-1B status do not need to be filed by April 1<sup>st</sup>. Also, 20,000 numbers have been allocated specifically to aliens who have obtained master's degrees from United States universities. It is not presently cleared whether their "cap" will be reached on the first day. Many are predicting that it will.

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## **2. Fines, Prosecutions for Hiring Undocumented Workers to Increase**

Secretary of Homeland Security Michael Chertoff and Attorney General Michael Mukasey announced on February 22, 2008, that the fines for hiring undocumented workers will increase and that the Departments of Homeland Security and Justice are also working "to increase criminal prosecutions against the most egregious employer offenders." The increased fines are expected to take effect March 27, 2008, and will be assessed on a per-worker basis. For example, if an employer knowingly employs five undocumented workers, the employer could incur five fines. The minimum penalty for knowingly hiring an undocumented worker will increase from \$275 to \$375. The maximum fine for a first-time offender will increase from \$2,200 to \$3,200, and the maximum fine for repeated violations will increase from \$11,000 to \$16,000.

Secretary Chertoff's and Attorney General Mukasey's statements are available at [http://www.dhs.gov/xnews/releases/pr\\_1203722713615.shtm](http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm). A related Department of Justice (Executive Office for Immigration Review) final rule was published in the Federal Register and is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20081800/edocket.access.gpo.gov/2008/pdf/E8-3320.pdf>.

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## **3. Many Employment Visa Number Cut-Off Dates Advance in March**

The Department of State's Visa Office announced that visa number cut-off date movement for March in several employment categories is significant. Advancement of the priority cut-off dates now, the Department said, "should prevent a situation later in the fiscal year where there are large amounts of numbers available but not enough time to use them." If an expected increase in number use materializes from U.S. Citizenship and Immigration Service processing, future cut-off date movements could slow or stop, the Department warned. The India employment-based second preference category remains unavailable in March.

The March 2008 Visa Bulletin, which includes a chart showing the cut-off dates in each category, is available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_3953.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_3953.html).

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#### **4. USCIS Issues Q&A on Delays, House Holds Hearing**

U.S. Citizenship and Immigration Services (USCIS) has issued questions and answers on receipting and processing delays, along with some fee issues. The agency noted that because of a significant increase in the number of applications filed, average processing times for certain application types filed after June 1, 2007, may become longer. For example, immigrant petitions for relatives and workers may take 9-10 months.

As of February 15, 2008, all receipting operations at USCIS Service Centers and the Chicago Lockbox are current, the agency said.

The questions and answers are posted at

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=82b06a9fec745110VgnVCM1000004718190aRCRD&vgnnextchannel=1958b0aaa86fa010VgnVCM10000045f3d6a1RCRD>.

The House of Representatives' immigration subcommittee held a hearing on naturalization delays on January 17, 2008. The hearing testimony is available at <http://judiciary.house.gov/oversight.aspx?ID=403>.

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#### **5. DOS Testifies on Status of Visa Policy for Foreign Students, Scholars, Exchange Visitors**

Stephen "Tony" Edson, Deputy Assistant Secretary of State for Visa Service, testified on February 7, 2008, before the House of Representatives' research and science education subcommittee. Among other things, he noted that foreign students contribute over \$13 billion annually to the U.S. economy. "Their work significantly boosts our academic and scientific research and their exposure to our culture and freedoms is a crucial public diplomacy success," he said. Mr. Edson noted that exchange visitor admissions have risen to record highs; in fiscal year (FY) 2007, the Department issued 343,946 J-1 visas, which was 11 percent over the same period in FY 2006. He noted that 90 percent of posts have wait times of less than 30 days for student and business travelers.

The full text of Mr. Edson's testimony, which includes statistical tables by year, is available at

[http://democrats.science.house.gov/Media/File/Commdocs/hearings/2008/Research/08feb07Research/Edson\\_Testimony.pdf](http://democrats.science.house.gov/Media/File/Commdocs/hearings/2008/Research/08feb07Research/Edson_Testimony.pdf). The hearing testimony of all the witnesses is available at

[http://science.house.gov/publications/hearings\\_markup\\_details.aspx?NewsID=2064](http://science.house.gov/publications/hearings_markup_details.aspx?NewsID=2064).

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## **6. USCIS Revises Security, Name Check Requirements**

U.S. Citizenship and Immigration Services (USCIS) issued a memorandum to the field on February 4, 2008, on revised national security adjudication and reporting requirements. The memo notes that USCIS is revising its guidance in response to a need to align the agency's background and security check policies with those of U.S. Immigration and Customs Enforcement (ICE). In the context of removal proceedings, ICE has determined that Federal Bureau of Investigation (FBI) fingerprint checks and Interagency Border Inspection Services (IBIS) checks are required. If an FBI name check reveals "actionable" information after an immigration judge has granted permanent residence, the memo states, the Department of Homeland Security may detain the permanent resident and initiate removal proceedings.

USCIS said that a definitive FBI fingerprint check and an IBIS check must be obtained and resolved before approval of an Application for Adjustment of Status (Form I-485), Application for Waiver of Ground of Inadmissibility (Form I-601), Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act (Form I-687), or Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603) (Form I-698).

USCIS said it will continue to initiate FBI name checks when those applications are received. Where the application is otherwise approvable and the FBI name check request has been pending for more than six months, USCIS said the adjudicator will approve the I-485, I-601, I-687, or I-698 and proceed with card issuance. "The FBI has committed to providing FBI name check results within this timeframe," the memo noted. There is no change in the requirement that name check results be obtained and resolved before the adjudication of a naturalization application.

The memo is available at  
<http://www.uscis.gov/files/pressrelease/DOC017.PDF>.

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## **7. E-Verify Participants Increasing by 1,000 Per Week**

U.S. Citizenship and Immigration Services (USCIS) announced that the E-Verify employment status verification program now has more than 52,000 employer participants, and that the program has been growing by approximately 1,000 participants per week since October. USCIS is

recruiting new personnel for the first regional verification center in Buffalo, New York.

USCIS noted that participation in E-Verify remains voluntary, but that some states have begun requiring their employers to comply with a federal work authorization verification program. Arizona, for example, increased participation of its employers in E-Verify from 325 a year ago to more than 18,000 today.

Meanwhile, Illinois has delayed until April 15, 2008, implementation of a new law that would prohibit employers from participating in E-Verify until federal agency databases are able to resolve 99 percent of discrepancies within three days. The Illinois legislature is considering several bills that would amend the law.

USCIS' announcement is available at <http://www.uscis.gov/files/pressrelease/everify12022008.pdf>.

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## **8. A New Online Guide: Navigating the Immigration Debate**

America's immigration issues are complex and have no easy answers. Frequently, individuals have professional, workplace opinions about some immigration issues and private, personal opinions about others. It is clear that there are no simple solutions.

The American Immigration Lawyers Association has a new online publication ready for download. Their publication, *Navigating the Immigration Debate: A Guide for State and Local Policy Makers and Advocates*, is a free, online tool designed for people grappling with immigration-related policy issues and trying to figure out for what they should advocate at local, state and national level. The guide provides background information on seven of the most contentious policy debates: public benefits restrictions, employment eligibility verification requirements, day-laborer sites, English-only rules, housing restrictions, state and local police responsibilities, and driver's licenses/Real ID rules. Each section of the guide also includes a myths-and-facts sheet, examples of relevant legislative activity and litigation, and links to helpful resources, such as reports, polling data, testimony and references to experts' organizations. Hopefully, this guide will provide decision-makers with a broad understanding of the history and complexity of each issue area, examples of failed and successful local policy initiatives, and sensitivity to the inherent pitfalls with states and localities legislating in the immigration arena. The guide is available at <http://www.aila.org/stateguide>. This

guide is not for everyone, but contains some very interesting information, if you have a few spare minutes available.

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

### GAO: Visa Waiver Program: Limitations with Department of Homeland Security's Plan to Verify Departure of Foreign Nationals.

This report presents U.S. Government Accountability Office testimony concerning a required action under legislation passed in August 2007 providing the Department of Homeland Security (DHS) with the authority to expand the Visa Waiver Program to additional countries whose nationals' applications for short-term business and tourism visas were refused between 3 and 10 percent of the time in the previous fiscal year. Countries must meet certain conditions, and the DHS must first complete and certify a number of required actions. This report focuses on the requirement that an "air exit system" be in place that can verify the departure of 97 percent of foreign nationals who depart through U.S. airports. The DHS told the GAO in December 2007 that it will match records of foreign nationals departing the country, as reported by airlines, to the agency's existing records of any prior arrivals, immigration status changes, or prior departures from the U.S. Using this formula, DHS stated that it can attain a match rate above 97 percent, based on August 2007 data, to certify compliance with the legislative air exit system requirement. The DHS told the GAO that it believes this methodology would meet the statutory requirement. On February 21, 2008, the DHS said that it had not finalized its decision on the methodology the agency would use to certify compliance but confirmed that the basic structure of its methodology would not change, and that it would use departure records as the starting point.

The GAO noted several limitations with this methodology. For example, it does not begin with arrival records and determine whether the foreign nationals stayed in the U.S. beyond their authorized periods of admission (referred to as overstays), and therefore does not show overall and country-specific overstay rates, which the GAO said are key factors in determining the risks of undocumented immigration under the Visa Waiver Program. In addition, the GAO noted that the DHS' current methodology does not address the accuracy of airlines' transmissions of departure records, and DHS acknowledges that there are weaknesses in the departure data. For example, there may be some visitors who did not leave the country by air even though they were recorded on airlines' manifest data as having departed. The inability of the U.S. government to track the status of visitors in the country, to identify those who overstay their authorized period, and to

use this data to compute overstay rates have been longstanding weaknesses in the oversight of the Visa Waiver Program. The GAO concluded that the DHS's plan to meet the "97 percent" requirement in the Visa Waiver Program expansion legislation will not address these weaknesses.

The GAO report is available at <http://www.gao.gov/new.items/d08458t.pdf>.

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

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