

LitwinLaw Update

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- **2. USCIS Redesigns E-Verify Online Interface; Employers Required To Complete Tutorial** - Users are required to complete a free 20-minute tutorial the next time they login before using the new interface.
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- **10. USCIS Proposes Changes in Fees, Large New Fee for EB-5 Regional Center Applications** - A new proposed fee rule would increase the average application and petition fees by a "weighted average" of approximately 10 percent, and would establish a hefty new fee of \$6,230 for an application for regional center designation under the EB-5 Immigrant Investor Pilot Program.

➤ **11. Secretary of Labor Announces \$78.4 Million for Farmworker Jobs Program** - The program provides training and employment services to migrant and seasonal farmworkers.

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Details...

1. Lawsuit Challenges H-1B Memo on Employer-Employee Relationship

A group of IT staffing firms and associations has filed a lawsuit challenging a memo issued in January 2010 by Donald T. Neufeld, Associate Director of Service Center Operations for U.S. Citizenship and Immigration Services (USCIS), that provided guidance on determining employer-employee relationships for H-1B purposes.

The firms, Broadgate Inc., Logic Planet Inc., DVR Softek Inc., and trade associations TechServe Alliance and American Staffing Association, filed the lawsuit on June 8, 2010, in the U.S. District Court for the District of Columbia. Among other things, the suit alleges that the memo is arbitrary and capricious and not authorized by law or under USCIS' statutory and regulatory authority. The group argues that denials are being issued under the memo's guidance for beneficiaries whose visa applications were approved previously under the regulatory criteria.

"IT staffing is a lawful business model that greatly benefits the U.S. economy, U.S. businesses and U.S. workers. The government should not be allowed to attack the industry by circumventing the rulemaking process and reversing long-standing policy by decree," said Mark Roberts, chief executive officer of TechServe Alliance.

The Neufeld memo is available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf>. A Q&A on the Neufeld memo is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=3d015869c9326210VgnVCM100000082ca60aRCRD&vgnnextchannel=6abe6d26d17df110VgnVCM1000004718190aRCRD>.

2. USCIS Redesigns E-Verify Online Interface; Employers Required To Complete Tutorial

Effective June 13, 2010, U.S. Citizenship and Immigration Services (USCIS) has redesigned its E-Verify online interface. Users are required to complete a free 20-minute tutorial the next time they log in before using the new interface.

Among other things, USCIS has instituted a "1-2-3" step process to help employers verify an employee's work authorization.

Details on the E-Verify redesign, including links to "how-to" videos, are available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=7b9895c2f9cc8210VgnVCM100000082ca60aRCRD&vgnnextchannel=7b9895c2f9cc8210VgnVCM100000082ca60aRCRD>.

Information about the "1-2-3" step process is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6f542b0851cb8210VgnVCM100000082ca60aRCRD&vgnnextchannel=7b9895c2f9cc8210VgnVCM100000082ca60aRCRD>.

3. DHS Outlines Best Hiring Practices

As part of the ICE Mutual Agreement between Government and Employers (IMAGE) program (see the previous article in this issue), DHS recommends the following "best hiring practices":

- Use E-Verify to verify the employment eligibility of all new hires.
- Use the Social Security Number Verification Service (SSNVS) and make a good-faith effort to correct and verify the names and Social Security numbers of the current workforce.
- Establish a written hiring and employment eligibility verification policy.
- Establish an internal compliance and training program related to the hiring and employment verification process, including completion of the I-9 form, how to detect the fraudulent use of documents in the verification process, and how to use E-Verify and SSNVS.
- Require the I-9 and E-Verify process to be conducted only by an individual who has received appropriate training, and include a secondary review as part of each employee's verification "to minimize the potential for a single individual to subvert the process."

- Arrange for annual I-9 audits by an external auditing firm or a trained employee not otherwise involved in the I-9 process.
- Establish a procedure to report to ICE credible information of suspected criminal misconduct in the employment eligibility verification process.
- Establish a program to assess subcontractors' compliance with employment eligibility verification requirements. Encourage contractors to incorporate IMAGE Best Practices and when practicable incorporate the verification requirements in subcontractor agreements.
- Establish a protocol for responding to letters received from federal and state government agencies indicating that there is a discrepancy between the agency's information and the information provided by the employer or employee (for example, "no-match" letters received from the Social Security Administration).
- Establish a tip line mechanism (e.g., inbox, e-mail) for employees to report activity relating to the employment of unauthorized workers, and a protocol for responding to employee tips.
- Establish and maintain appropriate policies, practices, and safeguards against use of the verification process for unlawful discrimination, and to ensure that U.S. citizens and authorized workers do not face discrimination with respect to hiring, firing, or recruitment or referral for a fee because of citizenship status or national origin.
- Maintain copies of any documents accepted as proof of identity and/or employment authorization for all new hires.

The hiring practices and related information are available at <http://www.ice.gov/partners/opaimage/>.

6. USCIS Issues Guidance to Employers on Documentation of Work Authorization for TPS Beneficiaries

U.S. Citizenship and Immigration Services (USCIS) recently issued guidance on the documentation employers may accept and that temporary protected status (TPS) beneficiaries may present as evidence of employment eligibility.

The guidance notes that the expiration date on the card is usually the end of the TPS period for which the bearer last registered. When the Department of Homeland Security (DHS) extends a specific TPS country designation, it

sometimes issues a Federal Register notice containing a temporary blanket automatic extension of expiring employment authorization documents (EADs) for TPS beneficiaries from that country to allow time for USCIS to issue new EADs with updated validity dates. The USCIS Web site and the Federal Register notice will describe this EAD automatic extension and will note the date when the auto-extension ends. The extension is typically for six months, but the time period may vary.

If an employee presents a TPS-related EAD that is expired for completion of the Form I-9 employment authorization verification process, the employer must accept it if it remains unexpired based on an auto-extension of the EAD by DHS as announced in a notice published in the *Federal Register*. The card must reasonably appear to be genuine and to relate to the employee presenting it to be acceptable.

The guidance includes an example of a valid TPS-related EAD and additional detailed instructions. It is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=f876090684988210VgnVCM100000082ca60aRCRD&vgnnextchannel=8a2f6d26d17df110VgnVCM1000004718190aRCRD>.

4. ICE Proposes New IMAGE Application

U.S. Immigration and Customs Enforcement (ICE) has filed a 60-day notice for a new information collection application with the Office of Management and Budget for the ICE Mutual Agreement between Government and Employers (IMAGE) program, which is the outreach and education component of the Office of Investigations (OI) Worksite Enforcement program.

According to ICE, IMAGE "is designed to build cooperative relationships with the private sector to enhance compliance with immigration laws and reduce the number of unauthorized aliens within the American workforce." Under this program, ICE partners with businesses representing a cross-section of industries. A business initially completes and prepares an IMAGE membership application so that ICE can properly evaluate the company for inclusion in the IMAGE program. ICE noted that the information provided by the company "plays a vital role in determining its suitability for the program."

As part of IMAGE, ICE and U.S. Citizenship and Immigration Services (USCIS) provides education and training to the company on proper hiring procedures, fraudulent document detection, use of the E-Verify employment

eligibility verification program, and anti-discrimination procedures. Employers seeking to participate in IMAGE must agree to:

- Complete a self-assessment questionnaire;
- Enroll in E-Verify;
- Enroll in the Social Security Number Verification Service;
- Adhere to IMAGE Best Employment Practices;
- Undergo an I-9 audit conducted by ICE; and
- Review and sign an IMAGE partnership agreement with ICE.

Upon enrollment and commitment to the Department of Homeland Security's "best hiring practices" program (see the next article in this issue), participants are deemed "IMAGE Certified," a distinction DHS said it believes will become an industry standard. DHS said that it also intends to use the results of the IMAGE program and participation in IMAGE by partners in industry to guide the agency in shaping future worksite enforcement policy and legislation.

Additional information is available at <http://www.ice.gov/partners/opaimage/>. The notice is available at <http://edocket.access.gpo.gov/2010/pdf/2010-14042.pdf>. Comments will be accepted for 60 days until August 10, 2010, and should be sent to the person named in the notice.

5. Department of State Publishes Consular Fee Interim Rule, Reopens Comment Period

In response to a previously published proposed rule and related supplementary notice, the Department of State received 1,797 comments and has reopened the comment period for an additional 60 days, until August 27, 2010. The interim final rule takes effect on July 13, 2010. Nonimmigrant visa fees, including fees for Machine-Readable Visas (MRVs) and Border Crossing Cards (BCCs), have been modified under a separate rule published in May 2010, and those modified fees are also reflected in the Schedule of Fees in the interim rule.

Among other fee changes:

- The Department is increasing the application fee for a passport book for an adult (age 16 and older) from \$55 to \$70, and increasing the passport book security surcharge from \$20 to \$40. The application fee for a passport book for a minor (under age 16) will remain at \$40.
- Instead of a single fee for processing an immigrant visa, the Department has created fees depending on the category of visa. The application fee for an employment-based visa processed on the basis of an I-140 petition will be \$720. The application fee for a family-based visa (immediate relative and preference) processed on the basis of an I-130, I-600, or I-800 petition will be \$330. Other immigrant visa applications (including for diversity visa applicants) will have a fee of \$305.
- The Department is increasing the immigrant visa security surcharge, which all applicants except those statutorily exempted must pay, from \$45 to \$74.

The interim final rule, which includes a long discussion of the many comments received, is available at <http://edocket.access.gpo.gov/2010/pdf/2010-15622.pdf>.

7. U.S. Embassies, Consulates in China Temporarily Open on Saturdays

On June 18, 2010, the Department of State announced that the U.S. Embassy in Beijing, along with four U.S. consulates general across China, is opening on Saturdays "over the next few weeks" to accommodate thousands of Chinese travelers seeking visas to visit the U.S.

Trade, commerce, people-to-people exchanges, and tourism between China and the U.S. have grown dramatically over the past few years, the Department noted. In 2009, U.S. consulates in China issued more than 487,000 visas to Chinese travelers. Sixty-six percent were for business and tourism. Growth in 2010 has been even more dramatic, with China's 2010 visa load up 28 percent over the same period last year.

The announcement is available at <http://www.state.gov/r/pa/prs/ps/2010/06/143364.htm>.

8. iCERT Glitches: DOL Responds

The American Immigration Lawyers Association recently queried the Department of Labor about difficulties in using the iCERT system, which is causing certain labor condition application cases in "initiated" status not to display online. A common reported problem is receiving an inappropriate warning when entering a prevailing wage source date. The DOL said it is working to correct the problems. Until they are resolved, the DOL advises anyone needing a PDF of an LCA that they cannot access to e-mail the LCA Help Desk at lca.chicago@dol.gov.

9. ABIL Global: Update from Australia

Australia's new Prime Minister, Julia Gillard, has signaled a major shift in immigration policy by declaring that she does not believe in a "big Australia."

Former Prime Minister Kevin Rudd was in favor of population growth, with his government predicting it to hit around 36 million by 2050, largely through immigration. Australia's population grew by two percent last year, mainly through migration - faster than any other developed country.

Since her appointment, Ms. Gillard has said, "Australia should not hurtle down the track towards a big population. I don't support the idea of a big Australia with arbitrary targets of, say, a 40 million-strong Australia or a 36 million-strong Australia. We need to stop, take a breath and develop policies for a sustainable Australia. I support a population that our environment, our water, our soil, our roads and freeways, our buses, our trains and our services can sustain."

But Ms. Gillard says that does not mean putting a stop to immigration altogether. Herself a migrant, Ms. Gillard said she would hold together an immigration policy that was pro-business and highly skilled, saying, "I don't want business to be held back because they couldn't find the right workers. That's why skilled migration is so important."

A recent poll showed 72 percent of people supported a rise in Australia's population, but 69 percent wanted it to remain below 30 million people.

Just a month before Ms. Gillard's appointment as Prime Minister, the Australian government had announced a new skilled migration program to address Australia's medium and long-term skill needs. At the same time, the government confirmed that employers would be able to continue to solve their skill shortages through employer-sponsored programs that would be given priority processing with state and territory governments and given a role in sponsoring skilled migrants to solve local skill shortages.

A new Skilled Occupations List (SOL) comes into effect on July 1, 2010, and provides for just 181 occupations, which is a significant decrease from the old SOL containing 408 occupations. The new SOL represents a more demand-driven approach towards the skilled migration program, emphasizing high-value skills that will assist in addressing Australia's labor market shortages. Under the old SOL, it was possible for a Ph.D. in environmental science from Harvard to miss out while a cook or hairdresser with low English skills who had completed a short technical course in Australia was able to proceed directly to permanent residence.

Occupations on the new SOL include doctors, nurses, dentists, accountants, engineers, IT professionals, and teachers (except primary school teachers), along with selected highly skilled trades, including electricians, carpenters, and motor mechanics.

By contrast, the demand-driven employer-sponsored temporary residence program allows businesses to sponsor over 620 managerial, professional, associate professional, and trade occupations. A key requirement for approval as a sponsor is that the business can demonstrate that it has met the training benchmark of spending at least one percent of gross payroll on training or upskilling its Australian workforce. Employers in regional Australia are able to sponsor not only these occupations but dozens of other occupations by entering into a Labour Agreement with the Australian government. For continued access to the program, a regional business must provide six monthly reports on efforts to recruit and train locals.

Employers can also nominate foreign workers for permanent residence in 430 occupations. A nominee must meet any of the following three criteria: (a) be paid in excess of A\$165,000 p.a.; (b) be working in Australia for at least two years on one of a select range of temporary visas, including at least one with the nominating employer; or (c) have their skills or qualifications assessed by an approved assessing authority and have at least three years of relevant industry experience. Fully documented applications can result in permanent residence approvals in just two months.

By comparison with many other developed economies, Australia already shows signs of recovery from the global financial crisis. The government is keen to ensure that skills are readily available to facilitate a full recovery as well as deal with the looming issues that will flow from Australia's aging population. To this end, newly elected Prime Minister Gillard has suggested that the government could pursue different migration policies for different parts of the country - the clearest indication yet that the skill needs of employers will be the driver of any new migration program.

10. USCIS Proposes Changes in Fees, Large New Fee for EB-5 Regional Center Applications

A new proposed fee rule would increase the average application and petition fees by a "weighted average" of approximately 10 percent, and would establish a hefty new fee of \$6,230 for an application for regional center designation under the EB-5 Immigrant Investor Pilot Program.

"Understanding the unique importance of naturalization," U.S. Citizenship and Immigration Services (USCIS) said it is not proposing a naturalization application fee increase. The proposed rule would establish several other new fees, however, including for individuals seeking civil surgeon designation (\$615) and recovery of the cost of processing immigrant visas granted by the Department of State (\$165). Among others, the Immigrant Petition for Alien Worker (Form I-140) fee would increase from \$475 to \$580; the Petition for a Nonimmigrant Worker (Form I-129) fee would increase from \$320 to \$325; and the Application for Employment Authorization (Form I-765) fee would increase from \$340 to \$380.

The rule also proposes to raise the fee for premium processing from \$1,000 to \$1,225, calculated by using the percentage increase in inflation according to the Consumer Price Index for urban consumers (CPI-U) since the fee's inception in 2001. The final rule will establish the amount based upon the latest published monthly CPI before the final rule publication. DHS also proposes to specify that it will use the CPI-U to calculate all future inflation-based fee adjustments and will publish a notice in the Federal Register annually (if applicable) to adjust this fee.

The proposed fee structure reduces fees for several individual applications and petitions, including the Application to Extend/Change Nonimmigrant Status (Form I-539) and the Application to Adjust Status From Temporary To Permanent Resident (Form I-698).

Written comments must be submitted by July 26, 2010, using a method set forth in the proposed rule. The proposed fee rule is available at <http://edocket.access.gpo.gov/2010/pdf/2010-13991.pdf>. USCIS' announcement, which includes a table of current and proposed fees, is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=269d3d5d65919210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>. A related Q&A is available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=a36b3d5d65919210VgnVCM100000082ca60aRCRD&vgnnextchannel=5b33aca797e63110VgnVCM1000004718190aRCRD>.

A transcript of USCIS' related press conference is available at <http://www.uscis.gov/USCIS/News/2010%20News%20Items/June%202010/PenPadTranscript9Jun10.pdf>.

11. Secretary of Labor Announces \$78.4 Million for Farmworker Jobs Program

On June 24, 2010, U.S. Secretary of Labor Hilda L. Solis announced \$78,410,000 in grant funds through the National Farmworker Jobs Program. The program provides training and employment services to migrant and seasonal farmworkers. The Department of Labor said the program "is designed to counter the impact of chronic unemployment and underemployment experienced by migrant and seasonal farmworkers who depend primarily on agricultural labor jobs."

"Farmworkers do so much for families and for the nation's economy as a whole. These hard-working members of our community deserve our support," said Secretary Solis. "Today's grants are an opportunity to help these workers as they upgrade their skills to improve their chances of advancement in their current employment or seek opportunities in other industries."

The National Farmworker Jobs Program provides funding to community-based organizations and public agencies that assist farmworkers and their families in attaining greater economic stability. In addition to skills training, the program provides support services that help farmworkers participate in training programs or retain their agriculture employment. Services provided to farmworkers under the program include skills assessments, job search assistance, basic education remediation, case management, and on-the-job training. In addition, the program provides services such as child care, health care, and transportation that help workers keep their current jobs or successfully complete training programs.

Of the 50 states, 48 each have one grantee. California has five grantees. There are no grantees in Alaska. National Farmworker Jobs Program grants are awarded every two years. The new grants are continuations of 2009 funding.

The announcement, which includes a full list of grantees by state and the amounts granted, is available at <http://www.dol.gov/opa/media/press/eta/eta20100878.htm>.

New Publications and Items of Interest

Characteristics of H-1B specialty occupation workers. U.S. Citizenship and Immigration Services has released "Characteristics of H-1B Specialty Occupation Workers" for fiscal year (FY) 2009. Highlights of the report include:

- The number of H-1B petitions filed decreased 15 percent from 288,764 in FY 2008 to 246,647 in FY 2009.
- The number of H-1B petitions approved decreased 22 percent from 276,252 in FY 2008 to 214,271 in FY 2009.
- Approximately 48 percent of all H-1B petitions approved in FY 2009 were for workers born in India.
- Two-thirds of H-1B petitions approved in FY 2009 were for workers between the ages of 25 and 34.
- Forty-one percent of H-1B petitions approved in FY 2009 were for workers with a bachelor's degree, 40 percent had a master's degree, 13 percent had a doctorate, and 6 percent were for workers with a professional degree.
- About 41 percent of H-1B petitions approved in FY 2009 were for workers in computer-related occupations.
- The median salary of beneficiaries of approved petitions increased to \$64,000 in FY 2009, which was \$4,000 more than in FY 2008.

The report is available at <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/H-1B/h1b-fy-09-characteristics.pdf>.

Guide to InfoPass. InfoPass is a free online appointment-scheduling service of U.S. Citizenship and Immigration Services (USCIS). The agency has released a guide with tips on using the service. The guide is available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f183bd85ef149210VgnVCM100000082ca60aRCRD&vgnnextchannel=f183bd85ef149210VgnVCM100000082ca60aRCRD>.

Recommendations on waivers of inadmissibility. The U.S. Citizenship and Immigration Services Ombudsman has released recommendations on processing waivers of inadmissibility. The Ombudsman found that challenges in the current waiver process often discourage applicants from applying, and that immigration attorneys are often reluctant to advise their clients to enter

into the waiver process. Among other things, the Ombudsman noted that limited access to information about processing times frustrates applicants; there is no standard process for applicants in urgent situations who are seeking expedited processing; discrepancies in interpretation of the extreme hardship standard lead to a lack of uniformity in decision-making; and predictability and transparency are critical because many applicants perceive the waiver application process as high-risk because it involves departure from the U.S. and a waiver denial may result in a lengthy bar on reentry.

The Ombudsman said it recognizes that USCIS has made improvements to this process, including the implementation of the I-601 Waiver Adjudication Program at the Ciudad Juarez Field Office (CDJ) in March 2007, which significantly improved caseload management. In addition, USCIS recently implemented an Ombudsman proposal to issue more specific Requests for Evidence. USCIS also revised the I-601 and developed a quality assurance pilot and a new standard operating procedures checklist to promote standardization in adjudications.

The Ombudsman recommends that USCIS:

- centralize the I-601 adjudication process;
- allow applicants to concurrently file the I-601 and the Form I-130, Petition for Alien Relative;
- prioritize the finalization of the USCIS overseas case management system (currently in development) to provide for accurate statistical reporting of I-601 applications, allowing for posted processing times, and enabling I-601 applications processed at CDJ to be tracked via the case status online feature on the USCIS Web site;
- publish clear filing instructions to guide customers in need of expedited I-601 processing;
- increase coordination between Department of State consular officers and USCIS adjudicators at CDJ who work with the I-601; and
- Allow USCIS employees to request digitized Alien Files upon receipt of interview schedules, amending CDJ's current office policy.

The report is available at http://www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.

Positive impact of immigrants. The Migration Policy Institute has released a report, *The Impact of Immigrants in Recession and Economic Expansion*, by

economist Giovanni Peri from the University of California at Davis. The report finds that "immigration unambiguously improves employment, productivity, and income," but that this involves adjustments that are more difficult during downturns. The report's results suggest that in the long run, immigrants do not reduce native employment rates, but they do increase productivity and hence average income. In the short run, the report finds that immigration may slightly reduce native employment and average income because the economic adjustment process is not immediate. The long-run gains to productivity and income become significant after seven to 10 years. The report also finds that the short-run impact of immigration depends on the state of the economy. When the economy is growing, new immigration creates jobs in sufficient numbers to leave native employment unharmed, even in the relative short-run and even for less-educated native workers. During downturns, the economy does not appear to respond as quickly, the report notes. New immigrants have a small negative impact on native employment in the short run.

The report is available at <http://www.migrationpolicy.org/pubs/Peri-June2010.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/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